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No.

In the Supreme Court of the United States

BRIDGEPORT ROMAN CATHOLIC DIOCESAN CORPORATION, CARDINAL EDWARD M. EGAN, REVEREND MONSIGNOR THOMAS DRISCOLL AS EXECUTOR OF THE ESTATE OF BISHOP WALTER CURTIS, REVEREND MONSIGNOR ANDREW T. CUSACK, AND REVEREND MONSIGNOR LAURENCE BRONKIEWICZ,

Petitioners,

v.

THE NEW YORK TIMES COMPANY, THE HARTFORD COURANT COMPANY, GLOBE NEWSPAPER COMPANY, INC., THE WASHINGTON POST COMPANY, AND GEORGE L. ROSADO,

Respondents.

On Petition for a Writ of Certiorari to The Supreme Court of Connecticut

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In civil suits challenging a church's determination that certain priests were suitable for ministry, petitioners (two Roman Catholic bishops, other clerical supervisors, and their Diocese) ("the Diocese") objected that any requirement that they produce internal personnel evaluations in discovery would violate the "internal affairs doctrine" that this Court has recognized under the First Amendment. Under protective orders that immediately sealed the material and prohibited any further dissemination or disclosure to third-parties, the Diocese produced the privileged material to plaintiffs' counsel. Years later, after the cases settled, several newspapers (respondents here) sought access to the sealed, privileged material. The Connecticut Supreme Court ruled that, by producing the confidential documents under the protective orders, the Diocese had "waived" the right to invoke the First Amendment privilege to prevent general public dissemination. The court also adopted a sweeping definition of the scope of "judicial documents" to which the public has a "presumptive right of access."

1. Under the test established by *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938), and its progeny, for "waiving" federal constitutional rights (that the party deliberately abandoned the constitutional right):

(a) Does a church waive otherwise valid First Amendment privileges by complying with a pre-trial protective order that seals confidential material and prohibits any disclosure to third-parties or the public, unless the church refuses to comply and goes into contempt?

(b) If *any* waiver of a constitutional privilege may be inferred under these circumstances, should this Court adopt the "selective waiver" concept and allow the party claiming the privilege to assert it against third-parties and the public?

2. Should the Court resolve the acknowledged conflict among federal and state appellate courts and determine:

(a) that the "presumptive right of public access" to "judicial documents" applies only to documents that are directly relevant to the public's evaluation of the courts' performance of substantive judicial functions, and

(b) that any presumption of public access must be balanced against the litigant's continuing interest in privacy?

RULE 14.1(b) STATEMENT

Petitioners are Bridgeport Roman Catholic Diocesan Corporation, Cardinal Edward M. Egan, Msgr. Thomas Driscoll (as Executor of the estate of Bishop Walter Curtis), Msgr. Andrew T. Cusack, and Msgr. Lawrence Bronkiewizc.

Respondents are the intervenors *New York Times* Company, *Hartford Courant* Company, *Washington Post* Company, and *Globe Newspaper* Company ("the Newspapers"), as well as George L. Rosado, the named plaintiff in the original case styled *Rosado* v. *Bridgeport Roman Catholic Diocesan Corporation*, (Superior Court of Connecticut, Judicial District of Fairfield at Bridgeport).

Respondents also include the named plaintiffs in the twenty-two other cases subject to the protective and sealing orders (or their equivalent) at issue in this Petition, although they did not participate in the proceedings before the Connecticut Supreme Court. These respondents are: J. Fleetwood, Sharon See, Jamie Belleville, S.P. Carr, M. Didato, John Doe, Paul Doyle, Sandra Forsberg, J. Harding, J. Knecht, Alvin Koscelek, William Kramer, James Krug, Katherine Landro, M. McDonough, Theresa Pace, J.L. Powers, Jenilee Rosado, Richard Rosado, James See, Ronald Slossar, and William Slossar. A list of these cases may be found at App.100a n.1.[1] Non-petitioning co-defendants are Raymond Pcolka Charles Carr, Martin Federici, and Walter Coleman.

In addition, four priests denominated John Doe 1-4 intervened in this litigation for the purpose of protecting their privacy rights from being compro-

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[1] "App._a" refers to the Diocese's Appendix to this Petition.

mised through the public disclosure of personnel files produced in discovery and filed under seal.

RULE 29.6 STATEMENT

The Bridgeport Roman Catholic Diocesan Corporation is a religious corporation established under Connecticut statutes. It has no securities owned by public shareholders.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Bridgeport Roman Catholic Diocesan Corporation, Cardinal Edward M. Egan, Msgr. Thomas Driscoll (as Executor of the estate of Bishop Walter Curtis), Msgr. Andrew T. Cusack, and Msgr. Lawrence Bronkiewizc (collectively "the Diocese"), petition for a writ of certiorari to review the judgment of the Supreme Court of Connecticut.

OPINIONS BELOW

The opinion of the Connecticut Supreme Court (App.1a-99a), is reported at 292 Conn. 1 (2009) ("*Rosado II*"). The decision of the Connecticut Superior Court (Alander, J.) (App.100a-138a), is unreported. The previous decision and orders of the Connecticut Superior Court (Levin, J.) (App.139a-163a) are unreported.

JURISDICTION

The judgment of the Connecticut Supreme Court was entered on June 2, 2009. The court denied a timely motion for reconsideration and reconsideration en banc on June 30, 2009. Under 28 U.S.C. § 1257(a), this Court has jurisdiction to review that court's decision.

STATEMENT

A. Three Judges Enter Protective Orders After the Diocese Raises First Amendment Objections to Pretrial Discovery.

Beginning in early 1993, amidst heavy media coverage, twenty-three lawsuits were filed against the Diocese and individual clergymen in Connecticut state courts alleging sexual abuse of minors. App.100a n.1. The cases sought to hold the Diocese

(including clerical superiors) liable under tort theories of *respondeat superior* and negligent supervision. The theory was that the Church's hierarchy, including two successive Bishops, had made misjudgments in evaluating the suitability of certain priests for ministerial assignments after they were accused of sexual abuse or after they returned from psychological or medical assessment or treatment.

In its Answers, the Diocese raised the First Amendment as an affirmative defense.[1]

In August 1994, plaintiffs noticed the depositions of two Bishops and demanded document production. Invoking the Free Exercise and Establishment Clauses, the Diocese moved for a protective order (i) barring forced disclosure of confidential information or documents (App.202a-204a) and (ii) restricting the use and dissemination of any discovery information obtained through the depositions of the two Bishops (App.200a-201a).

The Diocese objected that the First Amendment afforded the Diocese "the right to function as a religious institution without undue intrusion or entanglement from any branch of government, including our court system" and "calls for this Court to avoid excessive intrusion in the affairs of the Diocese as a

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[1] For example, the Diocese's June 30, 1994, Substituted Answer in *Rosado* stated:

> "The claims of negligent employment practices ... call for this Court to examine and pass judgment on policies and practices of the Roman Catholic Church which are based to a great extent on the religious tenets and the religious disciplines of the Roman Catholic Church. The free exercise of religion clause of the First Amendment *** bars this Court from adjudicating those employment practices ***."

religious institution and to avoid any discovery order which may be unduly burdensome to the Diocese's ability to function as a religious institution" (App.203a).

The Diocese also argued that requiring production and dissemination to "non-parties" of confidential files relating to "the Diocese's personnel practices and policies relating to priests" would violate the "free exercise of religion clause of the First Amendment" by invading the "internal affairs of the Roman Catholic Church" (App.200a).

In December 1994, Superior Court Judge Levin required that the Diocese produce the requested information to plaintiff's counsel for their exclusive use in preparing for any potential trial (App.156a-163a). However, the judge granted the Diocese's request to "seal" the confidential information and issued a "protective order," directing that "all information, documents and transcripts which the parties may obtain through the depositions of the defendants," of Church officials, and of Bishop (now Cardinal) Egan, would be unavailable to the media.

These materials included confidential physical and health information and internal Diocesan memoranda reflecting the hierarchy's evaluations of fitness for continued ministry. The materials could

> "not be disseminated, shown, disclosed, divulged or transmitted by any one to any person or organization other than the parties *** and their respective attorneys ***." (App.162a-163a).

Judge Levin noted that "edification of the public is not a proper purpose of pretrial discovery" (App.158a-162a). He concluded that the need to pro-

tect the Diocese's right to a fair trial sufficed to warrant the protective order. He took judicial notice of the media's coverage of the cases, including the presence of media representatives at the hearing (App.161a).

The protective order included a process for reviewing the Diocese's First Amendment privilege claims at a later stage:

(1) The prohibition against disseminating the confidential discovery material to anyone other than counsel and the parties was to remain in effect indefinitely, "[u]ntil further order of the court, which order shall be made not later than the completion of jury selection."

(2) Even if the cases eventually went to trial, the Diocese would have the right to object to any proposal to use the sealed material publicly:

> "All such documents and transcripts * * * shall be submitted to the court for review and appropriate order before being released from the protection afforded by this order."

(3) Any materials filed with the court in connection with any pretrial motions or proceedings had be filed under seal and marked conspicuously "CONFIDENTIAL: SUBJECT TO COURT ORDER." (App.163a).

Thus, the Diocese would have the right to reiterate its privilege objections to any *public* disclosures *before* any public disclosure could take place, even at the instance of the parties to whom the materials had been ordered produced. Two other judges in the

companion cases adopted Judge Levin's protective orders. (A410-20; A687; A844).[2]

There is no question that the Diocese *actually* believed that, by raising its First Amendment privileges in pursuing the protective orders and by complying with their terms, (i) the Diocese was preserving its constitutional privileges during the ensuing discovery process and (ii) no document subject to the asserted privileges would be released absent further court review, during which the Diocese could reassert its privilege claims.

Moreover, the Diocese understood that after issuance of the protective orders, it was obligated to produce discoverable materials under penalty of contempt. Accordingly, the Diocese did not continually repeat its constitutional privileges when it disclosed sensitive internal documents and provided the testimony of two Bishops in accordance with the terms of the protective orders.

Pursuant to the protective orders, various parties filed under seal 924 documents (many of them duplicates), totaling 12,675 pages. Most were appended to discovery-related motions, motions *in limine*, and motions for summary judgment that were later denied.

B. The Parties Settle The Underlying Cases.

After extensive settlement negotiations conducted by a federal magistrate judge acting as an independent mediator, the plaintiffs withdrew all twenty-three cases in March 2001, before any trial

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[2] "A__" refers to the Diocese's Appendix filed with the court below.

(A931, A935). According to unrebutted evidence, the Diocese's expectation that the sealed materials in the court's custody, including privileged discovery materials, would remain sealed was essential to the decision to settle on the terms to which the parties agreed (A931; A938).

C. A Year Later, Respondent *Hartford Courant* Violates The Protective Orders.

In March 2002, more than a year after the settlement, Respondent *Hartford Courant* somehow inveigled access to the sealed documents, which had remained in the court's custody. The *Courant* published a lurid article (A995-1007), detailing the contents of "thousands of documents in lawsuits that [the Diocese] fought, successfully, to keep sealed from public view" (A995). Acknowledging that the documents "remain sealed," the newspaper declared that that it "had obtained copies of much of them," including transcripts of pretrial testimony, internal Diocesan memoranda and "personnel files."

The Diocese promptly but unsuccessfully sought to retrieve its documents from the court's custody (A1110-1237).

D. The Newspapers Seek to Unseal And Publish The Confidential Documents.

A week later, having failed to act for more than a year since the settlement and nearly eight years since the entry of the first of nearly two dozen widely-publicized protective orders, Respondent *New York Times* filed an "emergency" motion to intervene in the settled cases, a motion later joined by three other newspaper companies, Respondents *Hartford Courant*, *Washington Post*, and *Boston Globe*. The *Times* invoked the presumptive "rights of public ac-

cess" found in "the First Amendment of the United States Constitution," as well as the Connecticut Rules of Court and the common law.[3]

E. The Connecticut Courts Vacate the Protective and Sealing Orders.

A new judge (Alander, J.) granted the Newspapers' motion to vacate the sealing orders and ordered public disclosure of virtually all of the Diocese's internal documents (App.137a-138a). He recognized that federal and state courts are in conflict about how to identify those "judicial documents" to which the public's presumptive right of access attaches. He opted for a broad rule (App.110a-117a).

He concluded that the Diocese had "waived" its First Amendment privileges by participating in pretrial discovery in accordance with the protective orders without lodging further objections when it actually produced the required materials (App.125a-129a). He also rejected the Diocese's alternative request to recognize the doctrine of "selective waiver," under which disclosure of confidential information on a selective basis to a limited category of recipients does not necessarily require the protected party to disclose the information to the world at large (App.130a).

A divided Supreme Court of Connecticut affirmed (App.4a-5a). In defining "judicial documents," the court identified a three-way split among federal and state appellate courts. The court acknowledged that

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[3] The Newspapers' intervention motion initially went up to the Supreme Court of Connecticut on a jurisdictional question. See *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, 276 Conn. 168 (2005) ("*Rosado I*") (excerpted at App.164a-177a).

the purpose of this "presumption," which has its own First Amendment dimension, is to enable the public to monitor how *the courts* are performing their adjudicative functions. The court adopted the broad view that the presumption applies to any document filed with a court on which the court reasonably *could* rely in support of *any* adjudicatory function.

The majority also upheld the trial court's conclusions (i) that the Diocese had waived its federal constitutional privileges by not standing on its claims of First Amendment privilege when disclosing documents and testimony pursuant to the protective orders, and (ii) that "selective waiver" was not available to preserve any portion of the Diocese's constitutional privilege.[4]

Neither Judge Alander nor the appellate court denied that the First Amendment privileges that the Diocese had allegedly "waived" are valid or otherwise

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[4] These claims were raised and preserved throughout the proceedings. For example, the Diocese's briefs before the Connecticut Supreme Court argued the privilege issues over the course of several pages, including a section entitled "The Constitutional Privileges." (App.189a-190a). See also App.186a-190a (Defendants Br. May 15, 2007), explaining why the "compelled disclosure of such confidential, privileged communications and deliberations would violate the Religion Clauses of the Federal Constitution ...".

Before Judge Alander, the Diocese's counsel explained that "no production was voluntary" (App.292a), and Judge Alander considered sufficient the Diocese's discussion of its privileges: "I think it's been well covered in your memorandum, the specific privileges that you're claiming and the basis for them." (App.197a).

Moreover, the Diocese provided the court with a comprehensive privilege log identifying *each* privilege claimed for *each* document.

applicable. See App.62a-63a n.36 ("Because we conclude that the trial court properly determined that the defendants waived all privileges . . ., we express no opinion as to whether the first amendment affords any such religious privileges.").

REASONS FOR GRANTING THE PETITION

The decision of the Supreme Court of Connecticut presents two issues of substantial importance.

I. The Connecticut Court's Waiver Standard Conflicts With This Court's Waiver Jurisprudence.

A. The First Amendment Prohibits Civil Authority From Intruding Into Internal Church Governance, Including Ministerial Assignments.

The First Amendment privileges that the Diocese raised and reiterated throughout the litigation, but was later deemed to have waived, are genuine. They rest on the principle that a church may not be compelled to disclose internal documents relating to hierarchical determinations regarding fitness for ministry.

The Religion Clauses of the First Amendment govern both legislative and judicial action. See *Kreshik* v. *St. Nicholas Cathedral*, 363 U.S. 190, 191 (1960); *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 8 (2004). Circumscribing the power of federal and state courts, this Court has established the "internal affairs" doctrine, which prohibits civil courts from reviewing church decisions about their own clerical matters:

> "[C]ivil courts are bound to accept the decisions of the highest judicatories of a religious

> organization of hierarchical policy on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law." *Serbian Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696, 713 (1976).

See also *Larkin* v. *Grendel's Den, Inc.*, 459 U.S. 116, 122 (1982) (one purpose of First Amendment was "to foreclose state interference with the practice of religious faiths"); *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-13 (1971) (First Amendment forbids excessive governmental entanglement with religion).

Lower courts have recognized this established constitutional autonomy. See, e.g., *Petruska* v. *Gannon Univ.*, 462 F.3d 294, 306 (3d Cir. 2006) ("Free Exercise Clause protects *** religious institution's right to decide matters of faith, doctrine, and church governance" (citing *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952)).

This constitutional autonomy applies not merely to matters of abstract theological doctrine and church structure but also to a church's determination of fitness for ministry. This corollary of the "internal affairs" doctrine is the "ministerial exception," which places outside the jurisdiction of federal and state courts any effort to reexamine a church's selection of its leadership or its ministers, or its evaluation of their fitness for ministry. See *Serbian Orthodox Diocese*, 426 U.S. at 717 ("questions of church discipline and the composition of the church hierarchy are at the core of ecclesiastical concern"). Thus,

> "it is the function of the church authorities to determine what the essential qualifications of a chaplain are *and whether the candidate possesses them*." *Gonzalez* v. *Roman Catholic*

Archbishop of Manila, 280 U.S. 1, 16 (1929) (emphasis added);

For at least a century, it has been settled that, under the Religion Clauses, courts are forbidden to "'interfere [] with ecclesiastical hierarchies, church administration, *and appointment of clergy*.'" *Rweyemamu* v. *Cote*, 520 F.3d 198, 204-05 (2d Cir. 2008) (emphasis added) (quoting *Minker* v. *Baltimore Annual Conf. of the United Methodist Church*, 894 F.2d 1354, 1357 (D.C. Cir. 1990)) (surveying roots of "ministerial exception"). See, e.g., *Rayburn* v. *General Conf. of Seventh Day Adventists*, 772 F.2d 1164, 1167-68 (4th Cir. 1985) ("right to choose ministers without government restriction underlies the well being of religious communit[ies]."); *McClure* v. *Salvation Army*, 460 F.2d 553, 558-59 (5th Cir. 1972) ("relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern.").

The underlying lawsuits here sought to hold the Bishops and the Diocese liable in tort for ministry-assignment decisions that occurred after psychiatric evaluation, confession, and assertions of reform and rehabilitation. Catholic doctrine enshrines forgiveness, redemption and rehabilitation; sinners are deemed to be recoverable rather than permanently damned. That tri-fold belief in remorse, redemption, and rehabilitation is necessarily an ingredient in the Diocese's decision making whether to restore someone to ministry who has been accused of improper conduct or even found to have engaged in such misconduct. Such ministry-assignment decisions are

fundamentally religious in nature and, as such, are constitutionally protected:

> "[T]he church as an institution must retain the corollary right to select its voice. A minister is not merely an employee of the church; she is the embodiment of its message ... Accordingly, the process of selecting a minister is per se a religious exercise. ... Consequently, any restriction on the church's right to choose who will carry its spiritual message necessarily infringes upon its free exercise right to profess its beliefs." *Petruska*, 462 F.3d at 306-07.

As one court explained in barring claims of negligent hiring, training and supervision filed against an Archdiocese in a case alleging a priest's sexual misconduct against a minor, the First Amendment

> "prevents the courts of this state from determining what makes one competent to serve as a Catholic priest since such a determination would require interpretation of church canons and internal church policies and practices." *Pritzlaff* v. *Archdiocese of Milwaukee*, 194 Wis. 2d 302, 326 (1995).

Civil juries and civil courts are not to be allowed, in retrospect, to conclude that the Diocese's weighing of these factors resulted in a misguided or negligent decision about how to handle the allegations against the individual minister, even if allegations are confirmed. As the D.C Circuit recognized in *Minker*: "We also agree that any inquiry into the church's reasons for asserting Minker was not suited for a

particular pastorship would constitute an excessive entanglement in its affairs." 894 F.2d at 1360.[5]

Admittedly, the lower courts have split on the scope of these principles. See, *e.g.*, *Malicki* v. *Doe*, 814 So. 2d 347, 353-65 (Fla. 2002) (discussing split in authority); *Roman Catholic Diocese of Jackson* v. *Morrison*, 905 So. 2d 1214, 1224-37 (Miss. 2005) (same); *Swanson* v. *Roman Catholic Bishop of Portland*, 692 A.2d 441, 446-47 (Me. 1997) (Lipez, J., dissenting) (this is "an area of the law in which the U.S. Supreme Court cases offer limited guidance and there remains significant doctrinal uncertainty"); *Morrison*, 905 So. 2d at 1248-56 (Smith, C.J., *dissenting*) (collecting cases).

One of the trial judges here rejected the Diocese's argument that the First Amendment bars a claim against a church for negligent supervision or retention, but recognized a split in authority on this question. See *Rosado* v. *Bridgeport Diocesan Corp.*, 716 A.2d 967, 969-71 (Conn. Super. 1998). If the Diocese had not settled the cases, relying upon the continued protections provided by the protective orders, it would have retained the right to appeal that erroneous decision. Indeed, the Connecticut Supreme Court left open the question whether the First Amendment bars claims against a church alleging negligent hiring, retention and supervision of its ministers (App.62a-63a n.36).

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[5] A church's First Amendment right to make these decisions without civil court supervision does not protect individual clergymen from being held personally accountable for their *own* misconduct in violation of facially neutral legislative norms. See *Employment Div., Dept. of Human Res. of Oregon* v. *Smith*, 494 U.S. 872, 885 (1990).

Any lingering uncertainty about the answer to that question frames the issues now before this Court.

B. The First Amendment Also Creates a Corollary Privilege Against Civil Discovery And Forced Public Disclosure Of Internal Church Documents Concerning Ecclesiastical Policy Decisions.

Because courts lack a legitimate role under the First Amendment to examine a church's employment decisions regarding its ministers, the courts similarly lack constitutional authority to require a church to produce and publicly disclose confidential internal documents or testimony that would be germane only to second guessing those decision decisions. See *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979) ("It is not only the conclusions that may be reached by the Board which may impinge on the rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions."); see *Hiles* v. *Episcopal Diocese of Massachusetts*, 773 N.E.2d 929, 936-37 (Mass. 2002) (protecting under First Amendment internal church records, reflecting parishioner's accusation against priest in church disciplinary process, from being "tested in a civil court").

Various federal and state appellate courts have applied this constitutional autonomy to bar discovery that would involve what the D.C. Circuit called "excessive entanglement" in the internal affairs of a church, such as "any inquiry into the Church's reasons" for determining that a clergyman was or was not suitable for a particular assignment. *Minker*, 894 F.2d at 1360; see, e.g., *Rayburn*, 772 F.2d at 1170 ("Church personnel and records would inevita-

bly [but impermissibly] become subject to subpoena, discovery, cross-examination, the full panoply of legal process designed to probe the mind of the church in the selection of its ministers"); *Doe* v. *Corp. of President of Church of Jesus Christ of Latter Day Saints*, 90 P.3d 1174, rev. denied, 110 P.3d 213 (Wash. 2005); *McKelvey* v. *Pierce*, 800 A.2d 840 (N.J. 2002).

Accordingly, the First Amendment circumscribes discovery that intrudes too deeply into matters of ecclesiastical autonomy. That was the privilege that the Diocese repeatedly raised here to protect the confidentiality of its internal records of clerical evaluation. The protective orders assured that no materials of this kind could be used at trial or publicly disclosed unless and until the trial judge ruled on the privilege as to specific documents "before being released from the protection afforded by this order" (App.163a).

C. The Standard That The Connecticut Supreme Court Established For Waiver Of Federal Privileges Conflicts With The Controlling Constitutional Standard.

In ordering the confidential materials disclosed to the public, neither Judge Alander nor the Connecticut Supreme Court denied the validity of the First Amendment privilege to protect confidential, internal church records from compelled public disclosure. Instead, the courts relied on a far too sweeping concept of "waiver."

"The question of a waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law." *Brookhart* v. *Janis*, 384 U.S. 1, 4 (1966). This Court demands a height-

ened standard before finding waiver of federal constitutional rights, even in civil cases: there must be "an *intentional* relinquishment or *abandonment* of a known right or privilege." *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938) (emphasis added). "Courts should 'indulge in every reasonable presumption against waiver.'" *Barker* v. *Wingo*, 407 U.S. 514, 525 (1972); see, e.g., *College Sav. Bank* v. *Fla. Prepaid Postsecondary Educ. Bd.*, 527 U.S. 666, 682 (1999).

The Connecticut Supreme Court's waiver standard upends these constitutional tests by conflating the *Zerbst* standard with the lower waiver standards associated with mere evidentiary privileges. The holding promises broad-reaching consequences for the administration of justice in both federal and state courts.

Here, the Diocese asserted and preserved its First Amendment privileges. The Diocese timely objected to discovery requests, timely raised the relevant constitutional objections in its motions for protective orders, and successfully persuaded the trial judges to provide the shelter of protective and sealing orders in response to specific deposition notices and document production requests. The orders provided that no confidential documents could be released publicly, absent additional judicial review during which the Diocese could reiterate its claim of privilege. The Diocese's participation in discovery occurred within this protective architecture.

Years later, a different Superior Court judge suggested that, after obtaining the protective orders, the Diocese was not acting "under the compulsion of a court order," when it produced the materials and thus it "waived" its constitutional privileges by failing to raise its constitutional privilege objections

again at the time of production, and the court below agreed (App.127a; App.61a-64a).

The conclusion that these circumstances show that the Diocese "voluntarily" produced privileged documents and testimony "without objection" cannot be squared with the controlling federal standard. See 26A Charles Wright, FEDERAL PRACTICE AND PROCEDURE § 5026 (1992) ("The holder does not 'voluntarily' disclose privileged matter when she does so pursuant to judicial compulsion. ... [D]isclosure is 'voluntary' [only] if the privilege is not asserted").

The federal standard for finding waiver cannot be so lax that it requires a litigant to continue to refuse to comply with the discovery request, even after the litigant successfully seeks a court's protection and, after invoking the constitutional privilege, obtains protective orders sealing the materials against any further dissemination to third parties. Compare *United States* v. *Kordel*, 397 U.S. 1, 7-10 (1970) (corporate officer waived privilege against self incrimination when answering government interrogatories after he failed to invoke Fifth Amendment privilege "*at any time*"). See *Nat'l Polymer Prods., Inc.*, v. *Borg-Warner Corp.*, 641 F.2d 318, 423-24 (6th Cir. 1981) ("clear and compelling" standard for relinquishment of First Amendment rights not met by compliance with pretrial protective order).

The court below failed to appreciate that the constitutional dimension of the First Amendment's "internal affairs" privilege and "ministerial exception" requires a different standard than that applied to mere evidentiary privileges. Indeed, other than an initial reference to *Zerbst*, every one of the cases on which the court relied in upholding the waiver determination involved non-constitutional privileges or

defenses, which are subject to lower waiver tests. (App.64a-66a).

The court below also misapprehended the controlling federal standard when it suggested that the Diocese had abandoned its claim of constitutional privilege, because Judge Levin's original ruling on the Diocese's motion for protective order was "ambiguous" and the Diocese had not sought a ruling "clarify[ing] the basis of the trial court's ruling" (App.66a, n.38). In the context of constitutional privileges, the operative presumption in the face of any ambiguity is *against* waiver. *Emspak* v. *United States*, 349 U.S. 190, 195-97 (1955); *D.G. Acquisition Corp.* v. *Dabah*, 151 F.3d 75, 81 (2d Cir. 1998); Paul Rice, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES, § 10:1 (2d ed. 2007) (observing that, if attorney-client privilege should "ever be recognized as a *constitutional* right, the standard for waiver would change dramatically" (citing *Zerbst*) (emphasis added)).

Producing the confidential material under the terms of the protective orders could not satisfy this Court's "deliberate" waiver standard. Under the protective orders, the Diocese was entitled to preserve the confidential status of documents, even at or beyond trial, by marking the documents "CONFIDENTIAL: SUBJECT TO COURT ORDER." Then, if a plaintiff wanted to use the document publicly, the plaintiff would have had to submit the document to "the court for review and appropriate order *before being released from the protection afforded by this order*" (App.32a-33a) (emphasis added). As even Judge Alander later acknowledged, "some affirmative step needed to be taken by Judge Levin before the protec-

tive order ended or before any documents were released from its protection." (App.107a-108a).

If the act of producing the documents to the plaintiffs under the protective orders had constituted an absolute "waiver" of the privileges, there would have been no reason to require court review before the sealed documents could be used at trial and made public. Because the orders necessarily assumed that the Diocese would not be waiving its privileges *even as against the plaintiffs*, who actually would receive the documents (subject to stringent limitations), the Diocese could not have "intentionally abandoned" the privileges as against strangers to the litigation when it complied with the protective orders.

Under the Connecticut court's decision, however, adherence to the process that the three trial judges had crafted amounted to an intentional abandonment of the privileges. The court ruled that, to preserve the Diocese's federal constitutional privileges even after it secured a protective order, the Diocese had to refuse to produce the information pursuant the orders and to go into contempt (App.67a-68a). That notion is fundamentally at odds with this Court's standard for finding a waiver of federal constitutional rights. See *Curtis Publ'g Co.* v. *Butts*, 388 U.S. 130, 145 (1967) ("we are unwilling to find waiver in circumstances which fall short of being clear and compelling."); *Hollins* v. *Methodist Healthcare, Inc.*, 474 F.3d 223, 226 (6th Cir. 2007) ("When First Amendment rights are at issue, the evidence must be clear and compelling that such rights were waived.").

It is important to the administration of justice for the Court to determine that a litigant – particularly

a church – producing privileged material under a protective order does not forfeit a constitutional privilege *by declining to go into contempt.*

D. The Subsidiary "Selective Waiver" Question Is Also Of Substantial Importance.

An important, related question is whether "selective waiver" is a valid mechanism for protecting constitutional privileges against unnecessarily broad waivers. If the Diocese in some sense "waived" its right to the *absolute* confidentiality of its internal deliberations by disclosing them to several lawyers and adverse claimants under stringent judicial protections, forbidding any further dissemination to third parties, was it "intentionally" abandoning its right to shield this confidential information from the world at large? There is no rational basis for that conclusion, and nothing in this Court's waiver jurisprudence justifies it.

The "selective waiver" principle recognized by some courts avoids the overbreadth of this kind of inference of waiver. See, *e.g.*, *Dellwood Farms, Inc.* v. *Cargill, Inc.*, 128 F.3d 1122, 1124 (7th Cir. 1997) (applying "selective waiver" rule in civil litigation following earlier disclosure of privileged material to another adversary, sustaining privilege); *Diversified Indus., Inc.* v. *Meredith*, 572 F.2d 596, 611 (8th Cir. 1977) (en banc) (same); see *also XYZ Corp.* v. *United States*, 348 F.3d 16, 28-29 (1st Cir. 2003). Other courts, however, refuse to recognize this doctrine, although for conflicting reasons. See, e.g., *In re Qwest Commc'ns. Int'l, Inc.*, 450 F.3d 1179, 1186-1201 (10th Cir. 2006); *Permian Corp.* v. *United States*, 665 F.2d 1214, 1221 (D.C. Cir. 1981).

As another circuit has recognized, selective-waiver case law is beset by "hopeless confusion." *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 295 (6th Cir. 2002). See also Gretchen Eoff, *Losing the War on Attorney-Client Privilege: Viewing the Selective Waiver Quagmire Through the Tenth Circuit's In Re Qwest Communications International*, 75 DEFENSE COUNSEL JOURNAL 79, 89 (2008) ("The federal circuits are split regarding the adoption of a selective waiver doctrine as an exception to the general rules of waiver upon disclosure of protected material."); Adam Aldrich, *In re Qwest Communications International: Does Selective Waiver Exist for Materials Disclosed During A Government Investigation?* 84 DENVER UNIV. L. REV. 809 (2006) (discussing troubling "lack of uniformity in reasoning among the circuits" regarding selective waiver).

The court below aligned itself with the courts that refuse to recognize this sensible way to avoid the dilemma of forcing a choice between complete obduracy and unlimited waiver of an otherwise valid privilege (App.68a) (citing D.C. Circuit in *Permian*, 665 F.2d at 1220-21, rejecting selective waiver, because party had made affirmative disclosure of privileged material to achieve tactical advantage in earlier proceeding).

Here, the Diocese asserted its constitutional privileges against all who sought to pry into its evaluations of fitness for ministry. It did not volunteer to produce this material selectively to some plaintiffs while withholding it from others. It was hardly in the Diocese's tactical interests to comply with these discovery demands, and it resisted doing so. Instead, the Diocese merely complied with court

orders that treated all plaintiffs equally, both in allowing pre-trial examination *and forbidding any further dissemination.* There is no basis to conclude that this limited and secure disclosure automatically – and "intentionally" – forfeited the right to keep the Diocese's private records off the front pages of the tabloids.

Therefore, even if the Diocese's compliance waived its right to *absolute* confidentiality, by providing restricted access to a small number of persons to whom the documents were disclosed under seal, this Court should consider whether federal and state courts must preserve as much of a constitutional privilege as possible by recognizing and applying the "selective waiver" doctrine.

II. The Courts Are Split on the Definition of "Judicial Documents" Subject To The "Presumption of Public Access."

This Court should grant certiorari to resolve the acknowledged conflict over the appropriate definition of the "judicial document" concept to which the limited presumption of public access applies.

A. The Federal Common-Law Presumption of Public Access Focuses On Monitoring Judicial Performance, Not Private Litigants' Affairs.

In *Nixon* v. *Warner Communications, Inc.*, 435 U.S. 589, 597 (1978), this Court recognized a federal right "to inspect and copy public records and documents." See *San Jose Mercury News, Inc.* v. *U.S. Dist. Court Northern Dist. (San Jose)*, 187 F.3d 1096, 1102 (9th Cir. 1999). The common law presumption of public access to court proceedings predates the adoption of the Federal Constitution and derives

from the centuries old practice of open trials. See *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 564 73 (1980) (plurality). This Court has extended the presumption to various court documents in the criminal context, see, *e.g.*, *Press Enterprise Co.* v. *Super. Ct. of California*, 464 U.S. 501 (1984) ("*Press Enterprise I*"). Federal and state appellate courts have extended the presumption to assorted court documents in the civil context. E.g., *San Jose Mercury News*, 187 F.3d at 1102.

As the court below acknowledged, the presumption's central concern is to permit the public to assess whether *the judicial process* is functioning properly. (App.37a). The purpose of the presumptive access is to enable the public to have enough access to judicial proceedings to evaluate how *the courts* are performing their important adjudicative role. See *Chicago Tribune Co.* v. *Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1309 (11th Cir. 2001).

The presumption never has been intended as a constitutional or common law right to gather information for the purpose of investigative journalism probing the activities of private litigants. Indeed, this Court has held that "[t]he right to speak and publish does not carry with it the unrestrained right to gather information." *Zemel* v. *Rusk*, 381 U.S. 1, 16-17 (1965). Nor does the First Amendment guarantee the press unique access to information beyond what is available to the public at large. *Houchins* v. *KQED*, 438 U.S. 1, 14-16 (1978).

In particular, the presumptive right of access was never understood as a vehicle for salacious inquiry into individual litigants' private matters.

> " [T]he right of access is grounded primarily in the need for scrutiny of the legal process, not simply in the public's desire to learn more about the deeds and misdeeds of the parties." *Mokhiber* v. *Davis*, 537 A.2d 1100, 1110 (D.C. 1988).

Moreover, the presumption is not absolute. Countervailing considerations may outweigh the public's interest even in monitoring judicial proceedings. See *Nixon*, 435 U.S. at 598 (right to inspect court records may give way when "court files might have become a vehicle for improper purposes" such as "to promote public scandal"); *San Jose Mercury News*, 187 F.3d at 1102. See also *United States* v. *Amodeo*, 71 F.3d 1044, 1048-49 (2d Cir. 1995) ("*Amodeo II*").

B. The Courts Are In Conflict Over The Scope Of "Judicial Documents."

The presumption of public access depends on the threshold question whether the documents are "judicial documents." See *Lugosch* v. *Pyramid Co. of Onondaga*, 435 F.3d 110, 120 (2d Cir. 2006). This case frames the questions that have divided federal and state appellate courts: What is the scope of this concept of "judicial documents," and how is the presumption of public access to be applied?

This Court has not squarely addressed the scope of "judicial documents" to which the presumption attaches in a civil dispute between private litigants. Compare *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20, 33 (1984) (noting "pretrial depositions and interrogatories are not public components of a civil trial," as such proceedings "were not open to the public at common law").

As the court below recognized, courts have divided on how to define judicial documents for this purpose, describing a three way split in authorities (App.41a-48a,). See "*Discovering Discovery: Non-Party Access to Pretrial Information in the Federal Courts 1928-2006*," 78 U. Colo. L. Rev. 817, 863 (2007) (analyzing how "judicial documents" is "a term subject to varying definitions across the federal courts").

Some have limited the documents to "materials on which a court [actually] relies in determining the litigant's substantive rights," *Anderson* v. *Cryovak, Inc.*, 805 F.2d 1, 13 (1st Cir. 1986) (citing *In re Reporters Committee for Freedom of the Press*, 773 F.2d 1325, 1340 (D.C.Cir. 1985); accord, *Federal Trade Comm'n* v. *Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 408-09 (1st Cir. 1987).

Other courts, including the court below, view as "judicial documents" all documents "that *reasonably may be relied upon* in support of *any part* of the court's adjudicatory function" (App.42a) (emphasis added). For example, this approach accords "judicial record" status to materials attached to discovery-related pretrial motions, or even requests for procedural orders (App.51a) ("among the courts following the majority rule, there is [also] a split as to whether discovery related motions and their associated exhibits should be considered judicial documents"). Compare *Mokhiber*, 537 A.2d at 1111 (holding presumptive right of public access applies to discovery motions and attached materials), with *Chicago Tribune*, 263 F.3d at 1312 (rejecting presumptive right of access to material filed with discovery motions, but holding "discovery material filed in connection with pretrial motions that require judicial resolution of

the merits" is subject to presumptive right of access), and *Reporter's Committee*, 773 F.2d at 1338 (Scalia, J.) ("We are certainly unaware of any tradition of public access (pre or post judgment) to all documents consulted (or, as appellants would have it, consultable) by a court in ruling on pre trial motions.").

The court below also identified a third approach that attaches the public right of access to *every* document *filed* with a court. See, e.g., *Leucadia, Inc.* v. *Applied Extrusion Techs., Inc.*, 998 F.2d 157, 161-62 (3d Cir. 1993).

Here, the Connecticut Supreme Court deemed to be "judicial records" a vast volume of documents filed under seal pre-trial, some filed in connection with motions *in limine*, others with discovery-related motions, and others in connection with the motions for summary judgment that were denied.

This Court should grant certiorari to resolve the question whether the presumptive right of access under the common law and First Amendment extends to all documents submitted to a court in connection with any request for any judicial ruling, regardless of how resolved, and regardless of whether access to the documents has any bearing on the public's ability to evaluate judicial performance.

C. This Court Has Jurisdiction To Review The "Judicial Documents" Question.

In opposing a stay, Respondents asserted that this Court lacks jurisdiction to review the "judicial documents" issue. The Court, however, has multiple bases of jurisdiction under 28 U.S.C. § 1257 to review the Connecticut court's definition and application of the "judicial documents" doctrine. For example, this Court possesses § 1257 jurisdiction when a "state

court's interpretation of state law has been influenced by an accompanying interpretation of federal law." *Three Affiliated Tribes* v. *Wold Eng'g, P.C.*, 467 U.S. 150, 152 (1984); see *Ohio* v. *Robinette*, 519 U.S. 33, 37 (1996); *Zacchini* v. *Scripps Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977); Eugene Gressman et al., SUPREME COURT PRACTICE, § 3.23 (9th ed. 2007). Several aspects of the Connecticut Supreme Court's analysis are inextricably intertwined with federal law – both First Amendment principles and federal common law.

First, it appears that this Court has concluded that, if the common law historically required certain proceedings to be open to public examination, the First Amendment codified and preserved that traditional requirement. Thus, a determination by a state court about what the "common law" requires necessarily implicates the First Amendment, at least where, as here, the state court relied on its understanding of traditional common law requirements rather than some state-specific *enlargement* of the common law.

The First Amendment was "enacted against the backdrop of the long history of trials being presumptively open." *Richmond Newspapers*, 448 U.S. at 575. This Court derived a qualified constitutional right of access to certain public proceedings from the First Amendment itself, a right that broadly overlaps with the common law presumption. *Press Enterprise Co.* v. *Super. Ct. of California*, 478 U.S. 1 (1986) ("*Press Enterprise II*").

As a result, the First Amendment substantially codified and guaranteed whatever the traditional common law originally required as a matter of presumptive public access. See *Globe Newspaper Co.* v.

Super. Ct. for the City of Norfolk, 457 U.S. 596, 604 (1982). See also *Reporters Committee*, 773 F.2d at 1339) (Scalia, J.) ("To the extent a First Amendment right to post judgment civil records exists, it does not exceed ... the traditional common law right.").

When determining whether the First Amendment extends to new kinds of proceedings or procedures that were unknown at common law, the Court reasons by analogy to determine whether the common-law rationale underlying public access to the courts' activities requires opening the new proceedings. *Press Enterprise II*, 478 U.S. at 8. See *In re New York Times Co. to Unseal Wiretap & Search Warrant Materials*, __ F.3d __, 2009 WL 2526486, **6-8 (2d Cir. Aug. 20, 2009); *Reporters Committee*, 773 F.2d at 1332-38 (Scalia, J.) (surveying historic practices regarding pre-judgment access and concluding that the First Amendment does not compel public access to pretrial or prejudgment matters). See also *Chicago Tribune*, 263 F.3d at 1310 ("Materials merely gathered as the result of the civil discovery process ... do not fall within the scope of the constitutional right of access's compelling interest standard.").

At bottom, it appears that a court's determination that the common law required some particular form or scope of access means that the First Amendment also guarantees such access. See *Lugosch*, 435 F.3d at 120. Compare *Reporters Committee*, 773 F.2d at 1336 (opinions of Scalia, J., and Wright, J., disagreeing over scope of common law right of access in civil cases).

The court below acknowledged the overlap between the common law and the First Amendment:

> "The public has a common law presumptive right of access to [judicial] documents ... *and likely a constitutional one as well*." (App.46a-47a) (emphasis added).

The court linked this common-law right-of-access to values "protected by the free-speech and free-press clauses of the First Amendment." (App.167a).

Indeed, the Respondent Newspapers themselves relied on the overlap between the common law and the First Amendment, arguing below:

> "[T]he public has a presumptive right of access to court proceedings and documents, *a right that traces its roots to the first amendment.*" Intervenors-Appellees Br. at 20 (July 23, 2007) (emphasis added).

When they sought to intervene to unseal the confidential material, their Motion invoked "the Connecticut Rules of Court, the common law, and the First Amendment of the United States Constitution." (¶ 2).

This acknowledged overlap between the common law and the First Amendment provides a source of jurisdiction to review what a state supreme court decides was required by the common law.

The Court also has jurisdiction because, in attempting to ascertain the scope of the "common law" presumption of public access, the court below relied almost entirely upon federal cases construing the First Amendment or federal common law. See *Robinette*, 519 U.S. at 37 (sustaining jurisdiction over state decision purportedly construing the Ohio constitution, where state court cited almost exclusively to federal cases).

Although the court asserted that its construction of its Practice Book was "not bound by a test that a federal court must apply" (App.59a), the court's construction of the rule rested on federal jurisprudence. The court held that Connecticut Practice Book § 11-20A "codifies the common law presumption of public access to judicial documents" (App.50a). The drafters of that rule, however, invoked this Court's decision in *Nixon* v. *Warner Communications, Inc.* and the First Amendment analysis in the Third Circuit's opinion in *Publicker* v. *Cohen*, 733 F.2d 1059, 1070 71 (3d Cir. 1984), to support the proposition that the "public and press enjoy a right of access to attend trials in civil as well as criminal cases." App.205a (Conn. Prac. Book. § 11-20A Commentary (2003)). The Commentary collects federal authorities construing the common law and the First Amendment as the basis for construing the procedural rule. See App.205a-208a (Conn. Prac. Book. § 42-49A Commentary (2003) (cited in Commentary to § 11-20A) (right of access "is well settled in the common law and *has been held to be implicit in the first amendment rights* of protecting the freedom of speech, of the press, ***") (emphasis added) (citing this Court's decisions in *Globe Newspapers*, *Richmond Newspapers*, and *Press Enterprise II*))).

Thus, the rule on which the court below relied was expressly framed to mirror the requirements of the First Amendment and federal common law in light of federal precedents. Accordingly, this Court has jurisdiction to determine whether the Connecticut Supreme Court misapprehended the scope of federal constitutional and common law principles. It should exercise that jurisdiction to settle the confusion in the courts about the correct reach of the "judicial documents" doctrine in civil cases.

III. The Issues Are Important.

As the cases cited above demonstrate, both sets of issues are recurring and important. The privilege issues affect a wide variety of religious denominations, because many types of claims affect a church's internal personnel decisions. The approach of the court below forces churches (and other litigants) to challenge discovery orders that otherwise seem to protect their privacy interests rather than to participate in a circumscribed discovery process that – like the one here – may lead the parties to resolve their underlying dispute without resort to a trial. Every church should know what it must do to secure constitutional protection for its confidential internal files, particularly whether it must go into contempt rather than accept the accommodation of some form of protective order.

The "judicial documents" issue affects not only churches but all litigants seeking to preserve confidential discovery material following a settlement. As the dissenting Justice observed, the Diocese settled the cases before reaching trial, relying on the permanence of the confidentiality protections. As a result of the decision below:

> "parties to future cases will be subject to the risk of such publicity regardless of whether they settle a case and, therefore, they will have a reduced incentive to settle." App.96a-97a (Sullivan, J., dissenting).

In sum, this Court should resolve the confusion about the operation of the presumption against constitutional waiver in civil discovery, the scope of any such waiver, and the scope of the filings with a court

to which the public has a presumptive right of access.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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Supreme Court of Connecticut.

George L. ROSADO et al., Plaintiffs-Appellees,

v.

BRIDGEPORT ROMAN CATHOLIC DIOCESAN CORPORATION et al., Defendants-Appellants.

No. 17807.

June 2, 2009.

ROGERS, Chief Justice, and KATZ, PALMER, VERTEFEUILLE and SULLIVAN, Justices.

KATZ, Justice.

This case returns to this court for the second time, having been remanded to the trial court following our decision in *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, 276 Conn. 168, 884 A.2d 981 (2005). The named defendant, the Bridgeport Roman Catholic Diocesan Corporation (diocese), and certain individual clergymen,[1] appeal

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[1] In addition to the Bridgeport Roman Catholic Diocesan Corporation, Reverend Monsignor Thomas Driscoll, as executor of the estate of Bishop Walter Curtis, Reverend Monsignor Andrew T. Cusack, Reverend Monsignor Laurence Bronkiewicz and Bishop Edward Egan, the appellants in the present case, also named as defendants in the original actions were Reverend Raymond Peolka, Reverend Walter Coleman, Reverend Charles Carr and Reverend Martin Frederici. Seven individuals, currently or previously employed by the diocese, filed pleadings

from the judgments of the trial court, *Alander, J.*, granting in part the motion of the intervenors,[2] four newspaper publishing companies, to vacate certain orders[3] (sealing orders) limiting disclosure of information obtained in twenty-three cases concerning allegations of sexual abuse by Roman Catholic clergy working under the direction of the

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as intervenors under the fictitious names Reverend John Doe I through Reverend John Doe VII for the limited purpose of preventing disclosure of confidential materials in their personnel records. These individuals thereafter opposed the intervening newspapers' motions to vacate the sealing orders. For purposes of convenience, we refer to the named defendants and the seven Reverend John Does collectively as the defendants.

[2] Four newspaper publishing companies, the New York Times Company, the Hartford Courant Company, the Washington Post Company, and the Globe Newspaper Company, filed motions seeking permission to intervene in twenty-three withdrawn cases concerning allegations of sexual abuse by members of the Roman Catholic clergy within the diocese of Bridgeport for the purpose of vacating previously entered sealing orders. In *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, supra, 276 Conn. at 230-31, this court concluded, inter alia, that the trial court "effectively" had granted those motions, and we remanded the matter to the trial court for a ruling on the motion to vacate those orders.

[3] As we set forth in greater detail in part II of this opinion, the orders at issue both prohibited dissemination of certain information obtained during discovery and sealed certain documents from public access. The original orders were modified at various times to address changes in circumstances. The parties to this appeal, however, agree that the order cited in part II of this opinion essentially reflects the substance of the orders at issue. For convenience, we refer to the orders at issue collectively as the sealing orders.

diocese that had been settled and withdrawn in 2001.[4]

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[4] The twenty-three underlying actions in which the intervenors sought information, all of which were filed initially in the judicial district of Fairfield and subsequently transferred to the judicial district of Waterbury, Complex Litigation Docket, are: *Belleville* v. *Bridgeport Roman Catholic Diocesan Corp.*, Docket No. CV-93-0157371-S; *Carr* v. *Bridgeport Roman Catholic Diocesan Corp.*, Docket No. CV-95-0159118-S; *Didato* v. *Bridgeport Roman Catholic Diocesan Corp.*, Docket No. CV-95-0157370-S; *Doe* v. *Bridgeport Roman Catholic Diocesan Corp.*, Docket No. CV-99-0157369-S; *Doyle* v. *Bridgeport Roman Catholic Diocesan Corp.*, Docket No. CV-94-0159065-S; *Fleetwood* v. *Bridgeport Roman Catholic Diocesan Corp.*, Docket No. CV-95-0156274-S; *Forsberg* v. *Bridgeport Roman Catholic Diocesan Corp.*, Docket No. CV-94-0159066-S; *Harding* v. *Bridgeport Roman Catholic Diocesan Corp.*, Docket No. CV-95-0157368-S; *Knecht* v. *Bridgeport Roman Catholic Diocesan Corp.*, Docket No. CV-96-0157367-S; *Koscelek* v. *Bridgeport Roman Catholic Diocesan Corp.*, Docket No. CV-94-0159067-S; *Kramer* v. *Bridgeport Roman Catholic Diocesan Corp.*, Docket No. CV-95-0157311-S; *Krug* v. *Bridgeport Roman Catholic Diocesan Corp.*, Docket No. CV-93-0157366-S; *Landro* v. *Bridgeport Roman Catholic Diocesan Corp.*, Docket No. CV-94-0159068-S; *McDonough* v. *Bridgeport Roman Catholic Diocesan Corp.*, Docket No. CV-97-0157365-S; *Pace* v. *Bridgeport Roman Catholic Diocesan Corp.*, Docket No. CV-95-0157086-S; *Powers* v. *Bridgeport Roman Catholic Diocesan Corp.*, Docket No. CV-94-0159069-S; *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, Docket No. CV-93-0157085-S; *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, Docket No. CV-94-0159070-S; *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, Docket No. CV-95-0157364-S; *See* v. *Bridgeport Roman Catholic Diocesan Corp.*, Docket No. CV-94-0159071-S; *See* v. *Bridgeport Roman Catholic Diocesan Corp.*, Docket No. CV-93-0157363-S; *Slossar* v. *Bridgeport Roman Catholic Diocesan Corp.*, Docket No. CV-94-0159072-S; and *Slossar* v. *Bridgeport Roman Catholic Diocesan Corp.*, Docket No. CV-94-0159073-S.

On appeal, the defendants contend that the trial court improperly denied their motion to disqualify the judicial authority assigned to hear the intervenors' motion to vacate the sealing orders because that trial judge's simultaneous service on a task force concerning public access to the courts while he presided over a case concerning public access to sealed documents created an appearance of impropriety that required disqualification. The defendants also claim that the trial court improperly vacated the sealing orders because, inter alia, it: (1) improperly determined that any documents filed with the court were subject to a presumption of public access, rather than limiting that presumption to "judicial documents," which they allege are pleadings and evidence that are the subject of a judicial ruling on the merits; (2) improperly concluded that the defendants had waived various privileges that would have shielded the documents from public access; and (3) applied an incorrect legal standard to determine whether the sealing orders should be modified.[5]

We conclude that the trial court properly denied the defendants' motion to disqualify the judicial

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[5] We note that the claims made in the arguments section of the defendants' brief to this court do not conform to their statement of the issues therein. For example, although the defendants' statement of the issues include a claim that the trial court improperly denied their motion for new protective orders, the defendants did not analyze this claim independently from their claim that the trial court improperly granted the motion to vacate. Accordingly, we consider that claim abandoned and have analyzed the defendants' claims as they have presented them in the argument section of their brief, with some clarification and reordering as necessary for organizational purposes.

authority. We also conclude that, with the exception of a limited number of documents in the court's files that are not subject to disclosure; see footnote 33 of this opinion; the trial court properly concluded that the documents were subject to the presumption of public access. Accordingly, we affirm the judgments of the trial court, except with respect to the fifteen documents that we subsequently identify in part II C of this opinion.

The record reflects the following undisputed facts and rather convoluted procedural history of this case.[6] Beginning in the mid-1990s, twenty-three actions alleging sexual abuse by Roman Catholic clergymen employed by the diocese were filed. In the course of pretrial discovery in those cases, upon the defendants' motions, the trial court, *Levin, J.*, issued sealing orders with respect to certain documents and information that had been obtained in discovery on the ground that their disclosure could jeopardize the defendants' right to a fair trial. During the course of litigation in those cases, and in accordance with those orders, the parties submitted numerous documents under seal to the court. On March 12, 2001, prior to the commencement of trial, all of the

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[6] We note that the record in this case is voluminous. In addition to the briefs, appendices and designated record that are part of any appeal, the court file in this matter included thirteen boxes containing multiple copies of 12,675 pages of material. The defendants also submitted forty-eight compact discs containing various logs and electronic copies of those 12,675 pages. Although the documents were identified individually by a Bates number, which is an identification scheme to organize large quantities of documents by which each individual page is stamped with a unique identifying number, no index was provided to indicate which Bates number corresponded to a particular document.

actions were settled and withdrawn. *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, supra, 276 Conn. at 173. The sealed documents thereafter remained in the court's possession.

We are mindful that the issues in this case are complex and far-reaching. Thus, we have endeavored to be conscientious and methodical in our review to ensure that all issues properly presented have been considered thoroughly. Nevertheless, we remind the parties that it is not the court's responsibility to parse through a voluminous record in search of material that may be relevant to its decision-making process. *State* v. *Montgomery*, 254 Conn. 694, 728, 759 A.2d 995 (2000). Except to the extent that the parties' briefs specifically referenced material and explicitly pointed this court to that material in the court file and/or provided copies of such material in their appendices, we have limited our review to what was presented to us in the briefs, appendices, and designated record.

On March 26, 2002, the New York Times Company moved to intervene in the settled cases and filed an emergency motion to vacate the sealing orders. Three other newspaper publishing companies sought to be joined as intervenors. See footnote 2 of this opinion. In May, 2002, the trial court, *McWeeny, J.*, granted the newspapers' request for intervenor status and granted in part the emergency motion to vacate. *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, supra, 276 Conn. at 184-85. That decision was stayed while the defendants appealed to the Appellate Court, which reversed the trial court's judgment on the ground that the trial court lacked jurisdiction to consider the motions to vacate because the four month period within which a motion to open

judgment must be filed pursuant to General Statutes § 52-212a[7] had expired. *Id.*, at 191. The intervenors then appealed from the Appellate Court's decision to this court, following our grant of certification to determine: whether the trial court effectively had restored the withdrawn cases to the docket and properly had permitted the newspapers to intervene; whether the Appellate Court properly had concluded that the four month period under § 52-212a deprived the trial court of the authority to restore the withdrawn cases to the docket; and, if not, whether the trial court had abused its discretion in permitting the newspapers to intervene. *Id.*, at 192. In a detailed and comprehensive decision, this court first agreed with the Appellate Court that the trial court effectively had restored the cases to the docket and properly had permitted the newspapers to intervene, but disagreed that the four month limitation period had deprived the trial court of jurisdiction over the intervenors' claims. *Id.* This court concluded that the trial court had not abused its discretion in restoring the withdrawn cases to the docket "for the limited purpose of litigating the issue of whether the protective orders in those cases should be ... modified" but also concluded, however, "that the trial court ... improperly had purported to adjudicate the merits of the [intevenors'] claim that the protective orders should be vacated or otherwise modified...." *Id.*, at 192-93. We therefore reversed the

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[7] General Statutes § 52-212a provides in relevant part: "Unless otherwise provided by law and except in such cases in which the court has continuing jurisdiction, a civil judgment or decree rendered in the Superior Court may not be opened or set aside unless a motion to open or set aside is filed within four months following the date on which it was rendered or passed...."

judgment of the Appellate Court with direction, inter alia, to remand the case to the trial court for a de novo determination, by a different judge, on the merits of the motion to vacate. *Id.*, at 231.

On remand, the case was assigned to Judge Alander at the Complex Litigation Docket in the judicial district of Waterbury. The defendants thereafter moved to disqualify Judge Alander, claiming that his participation on the judicial branch's public access task force (task force) coincident with presiding over this case raised an appearance of impropriety. Following a hearing on the defendants' motion, Judge Alander denied the motion to disqualify himself.

Subsequently, the defendants moved for the entry of a new protective order to bar public access to the documents in question in the event that the trial court modified the previous sealing orders. The trial court held a joint hearing on the intervenors' motion to vacate the sealing orders and the defendants' motion for a new protective order. Thereafter, the trial court granted in large part the intervenors' motion to vacate and denied the defendants' motion to enter a new protective order.

In its memorandum of decision, the trial court examined the public's right of access to court documents and analyzed the interests involved in keeping the documents at issue under seal. The court first concluded that Practice Book § 11-20A (a)[8] sets

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[8] Practice Book § 11-20A provides in relevant part: "(a) Except as otherwise provided by law, there shall be a presumption that documents filed with the court shall be available to the public.

"(b) Except as provided in this section and except as otherwise provided by law, including Section 13-5, the judicial authority

forth a presumptive right of public access to any document "filed with the court...." Because no Practice Book provision or controlling case law set forth a standard to determine whether sealing orders should be modified, the court adopted one, placing the burden on the moving party to show that appropriate grounds exist for modification. The court noted that such grounds would include the following: the initial basis for the sealing orders no longer exists; the sealing orders were granted improvidently; or the interests protected by the sealing orders do not outweigh the public's right of access to the document.

Applying that standard, the trial court found that the intervenors had established appropriate grounds for modification because the initial ground for the sealing orders-ensuring a fair trial-no longer existed because the cases had been withdrawn. Although the defendants had contended that their right to a fair trial still could be compromised

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shall not order that any files, affidavits, documents, or other materials on file with the court or filed in connection with a court proceeding be sealed or their disclosure limited.

"(c) Upon written motion of any party, or upon its own motion, the judicial authority may order that files, affidavits, documents, or other materials on file or lodged with the court or in connection with a court proceeding be sealed or their disclosure limited only if the judicial authority concludes that such order is necessary to preserve an interest which is determined to override the public's interest in viewing such materials. The judicial authority shall first consider reasonable alternatives to any such order and any such order shall be no broader than necessary to protect such overriding interest. An agreement of the parties to seal or limit the disclosure of documents on file with the court or filed in connection with a court proceeding shall not constitute a sufficient basis for the issuance of such an order...."

because additional actions raising similar claims were pending, the trial court found that, in light of the presumption of public access, continued sealing could not be justified by the existence of pending or potential cases and that less restrictive means existed to protect the defendants' right to a fair trial. Finally, the court rejected the defendants' claim that their reliance on the sealing orders in making disclosures outweighed the public's right of access to the documents, concluding that their reliance on the sealing orders as being permanent was unreasonable given that the express terms of the orders had provided that the orders would be reviewed "not later than the completion of jury selection...."

The trial court also rejected the defendants' claims that various constitutional and statutory privileges protected the information from disclosure. The court concluded that, with the exception of certain statutory medical records privileges, the defendants had waived any claims of privilege when they disclosed the documents to the plaintiffs.[9]

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[9] The defendants had asserted various privileges related to medical records, pursuant to General Statutes §§ 52-146c, 52-146d et seq., 52-146o, 52-146q and 52-146s, and confidential personnel records, pursuant to General Statutes § 31-128f. The trial court found that various documents protected by certain medical records privileges required an express waiver that had not been given, and, moreover, the defendant patients whose records were at issue repeatedly had objected to their disclosure. Accordingly, the court held that documents protected by those privileges, which it identified in its memorandum of decision, should remain under seal. The court did find, however, that the public's right of access to the material protected by the statutory personnel record privileges outweighed the individual privacy interests that the privilege protected. On appeal, neither the intervenors nor the

The trial court agreed, however, that a limited category of documents were not subject to a presumption of public access and should remain under seal. Specifically, the court concluded that documents submitted to the trial court for an in camera review were not subject to that presumption, noting that a contrary rule would eviscerate the confidentiality basis for conducting in camera reviews. The court further determined that, to the extent that the identity of two of the Reverend John Does who had intervened in the case under fictitious names to protect the privacy of their personnel records; see footnote 1 of this opinion; had not been made public but were contained in a sealed deposition, the names of those two priests were to remain sealed. Accordingly, the court granted the motion to vacate the sealing orders, except with respect to the documents that it had determined to be subject to the medical records privilege, the documents filed with the court for an in camera review, and the names of Reverend John Doe I and Reverend John Doe II. The court also denied the defendants' motion to enter a new protective order, citing the reasons it had set forth in granting the intervenors' motion to vacate the existing order.

The defendants appealed from the trial court's judgment to the Appellate Court, and we transferred the appeal to this court, pursuant to Practice Book § 65-1 and General Statutes § 51-199. Additional facts and procedural history will be set forth as necessary.

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defendants have challenged the court's determinations regarding the confidentiality of or privileges pertaining to the medical records and personnel records. Other privileges raised before the trial court and on appeal are set forth in part III of this opinion.

I

The defendants' first claim is that the trial judge improperly failed to recuse himself in violation of canon 3(c)(1) of the Code of Judicial Conduct[10] and Practice Book § 1-22(a).[11] The defendants claim that Judge Alander's concurrent participation on the judicial branch's public interest task force and his presiding over the motions addressing whether the public should be given access to previously sealed records gave rise to an appearance of impropriety.[12] The defendants point to the mission of the task force, the lack of task force members from the private sector advocating against public access and the

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[10] Canon 3(c)(1) of the Code of Judicial Conduct provides in relevant part: "A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

"(A) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding...."

[11] Practice Book § 1-22(a) provides in relevant part: "A judicial authority shall, upon motion of either party or upon its own motion, be disqualified from acting in a matter if such judicial authority is disqualified from acting therein pursuant to Canon 3(c) of the Code of Judicial Conduct...."

[12] The defendants do not claim that the mere fact of Judge Alander's participation on the task force necessitated his recusal from presiding over this case. On the contrary, the defendants expressly highlight Judge Alander's *simultaneous* service, along with the presence of an employee of one of the intervenors on the task force, as the basis for their claim. Indeed, when reminded expressly at oral argument before this court that one of the panel members hearing the appeal, Justice Palmer, had served on the same task force as Judge Alander, the defendants stated that they were not requesting the recusal of Justice Palmer from hearing this appeal.

presence of an employee of one of the intervening newspapers on the task force. We conclude that Judge Alander did not abuse his discretion in failing to recuse himself.

A

The record discloses the following additional relevant facts, which are undisputed. On May 9, 2006, after Judge Alander had begun presiding over the cases, the judicial branch reported that, one week earlier, Senior Associate Justice David M. Borden had created the task force.[13] According to a press

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[13] The dissent spends much time discussing a historical recitation of both the litigation surrounding the judicial branch's past practice of classifying sealed case files that resulted in the civil action entitled *Hartford Courant Co.* v. *Pellegrino*, 290 F. Supp. 2d 265 (D. Conn. 2003), and this court's decision limiting public access to certain records in *Clerk of the Superior Court* v. *Freedom of Information Commission*, 278 Conn. 28, 895 A.2d 743 (2006), and suggests that these two cases were largely responsible for the formation of the task force. Because the mission of the task force-"to make recommendations for the maximum degree of public access to the courts, [not merely court records as the dissent suggests] *consistent with the needs of the courts in discharging their core functions of adjudicating and managing cases*"-is undisputed; (emphasis added; internal quotation marks omitted) Press Release, Connecticut Judicial Branch, Judicial Branch's Public Access Task Force Schedules May 25 Meeting (May 9, 2006); the reason for its creation is of little relevance to the issue on appeal. Moreover, the dissent engages in a faulty syllogism in its attempt to connect the controversial supersealed cases with Judge Alander's simultaneous service presiding over the underlying actions in the present case and the task force. The dissent's reasoning would require us to engage in the following syllogism: (A) the judicial branch's position in the federal litigation over the supersealed cases was that the present case raised similar legal issues to warrant application of various abstention doctrines; (B) Judge Alander simultaneously

release issued by the judicial branch, Justice Borden explained: "The mission of the task force is to make recommendations for the maximum degree of public access to the courts, *consistent with the needs of the courts in discharging their core functions of adjudicating and managing cases*.... To that end, this task force is designed to foster constructive discussion and concrete solutions...." (Emphasis added; internal quotation marks omitted.) Press Release, Connecticut Judicial Branch, Judicial Branch's Public Access Task Force Schedules May 25 Meeting (May 9, 2006). Associate Justice Richard N. Palmer was named therein as the chairperson of the task force. Of the task force's additional seventeen members, eight were judges, one of whom was Judge Alander, seven were employees of the print and electronic media, one of whom was Alaine Griffin, a reporter for the Hartford Courant, one of the intervenors in the present case, and two were private

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presided over the underlying actions in the present case and served on the task force; therefore (C) there is a public perception that Judge Alander was involved in the controversy of supersealed cases. We decline to engage in similarly flawed logic, especially in light of the fact that Judge Alander had no involvement with the supersealing of files, had raised privacy concerns during his tenure on the task force; see footnote 18 of this opinion; and the Court of Appeals for the Second Circuit expressly concluded that the present case was "quite different" from the particular types of files involved in the case before it. *Hartford Courant Co.* v. *Pellegrino*, 380 F.3d 83, 99 (2d Cir. 2004); see *id.*, at 87 ("under level 1, which should be used when a case is statutorily sealed by the court, the matter is confidential and no information is to be released or disclosed to the public, including the docket number and case caption, and ... under level 2, the entire file is sealed but the case caption and docket number may be disclosed" [internal quotation marks omitted]).

practitioners who were self-described media advocates.

On May 25, 2006, Justice Borden convened the task force's opening meeting, which was open to the public. At the outset, he outlined the task force's mission as it was stated in the press release on the judicial branch's website. He then instructed the task force members that they would have to consider "legitimate expectations of privacy, legitimate concerns for security, and legitimate needs of confidentiality." Connecticut Judicial Branch, Public Access Task Force, Remarks of Senior Associate Justice David M. Borden for the Opening Meeting (May 25, 2006) p. 3. Justice Borden reminded them that they should be mindful of both sides of the equation and balance all of the interests involved to serve the larger public interest. He explicitly instructed members of the press who served on the task force to "address each question, not from the vantage point of a judge or a newsperson or a lawyer representing the media, but from the vantage point of the public interest...." *Id.*, at p.6.

Subsequently, speaking at the annual judges meeting on June 26, 2006, which was open to the public for the first time, Justice Borden once again set forth the mission of the task force, as we previously have described. He encouraged the judges to voice "arguments as to why things should not be made more open." Remarks of Senior Associate Justice David M. Borden, Annual Judges Meeting (June 26, 2006) p. 7.

Pursuant to a suggestion made by Justice Palmer at the task force's opening meeting, three

subcommittees were created, one of which was the committee on access to court records (committee).[14] Judge Alander was appointed to serve as a cochairperson of that committee. Both of the nongovernment members of the committee were newspaper reporters. One of those reporters was Judge Alander's cochairperson; the other was Griffin.

According to the final published report of the task force, the committee had met nine times between June 6 and August 21, 2006.[15] The report provides: "In the course of these meetings, extensive and vigorous discussions were held on each of the myriad [of] issues encompassed by the broad topic of public access to court records.... At the outset of its discussions, the [committee] adopted a set of guiding principles to inform its deliberations." Connecticut Judicial Branch, Public Access Task Force, Final Report (September 15, 2006) pp. 4-2 through 4-3. One such principle was that "all court records are presumptively open and court records should be closed only if there is a compelling reason to do so." *Id.*, at p. 4-3. The committee extensively discussed the question of what constituted a "court record," and proposed as one of its recommendations that the definition of that term to which the public has a right of access include: "Any document, information, or other item that is collected, received, or maintained by a court or clerk of [the] court in connection with a

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[14] The other two committees were the committee on access to meetings and judicial branch administrative records and the committee on access to judicial proceedings.

[15] It is unclear how many of the nine committee meetings preceded Judge Alander's July 21, 2006 decision granting in large part the intervenors' motion to vacate the sealing orders.

judicial proceeding...." *Id.*, at p. 4-12. The final report made clear that the task force's proposals were merely recommendations that would require further consideration and action by the executive, legislative and judicial branches before they could become effective. *Id.*, at p. 2-1.

The defendants in the present case first raised the issue of Judge Alander's recusal prior to the task force's first meeting in a letter to Judge Alander, dated May 24, 2006, suggesting that he recuse himself from presiding over either the task force or the twenty-three cases against the defendants. In response, Judge Alander issued an order directing the defendants' counsel to Practice Book § 1-23, which sets forth the procedures for filing a motion for disqualification of a judicial authority.[16] In accordance with § 1-23, on June 20, 2006, the defendants filed formal motions to disqualify Judge Alander in the twenty-three cases.

On July 21, 2006, Judge Alander denied the defendants' motions to disqualify himself. In his memorandum of decision, he identified the operative canons from the Code of Judicial Conduct, canon 3(c)(1); see footnote 10 of this opinion; and canon 4,[17]

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[16] Practice Book § 1-23 provides: "A motion to disqualify a judicial authority shall be in writing and shall be accompanied by an affidavit setting forth the facts relied upon to show the grounds for disqualification and a certificate of the counsel of record that the motion is made in good faith. The motion shall be filed no less than ten days before the time the case is called for trial or hearing, unless good cause is shown for failure to file within such time."

[17] Canon 4 of the Code of Judicial Conduct provides: "A judge, subject to the proper performance of his or her judicial duties, may engage in the following quasi-judicial activities, if in doing

the legal standard to be applied and the basis for the defendants' motion. He noted that the defendants were not asserting that he had made any comments or expressed any personal beliefs that concerned the pending litigation or that were contrary to their legal claims in the litigation. Rather, Judge Alander noted, the defendants' motion claimed that "the task force itself [had] been established to advocate the 'maximum' disclosure of information to the public, a position the [defendants claim] is the one held by the [intervenors] in this case, rather than the more limited disclosure [that] protects rights of privacy, which the [defendants assert] is commensurate with its position here."

Judge Alander explained why he had concluded that the defendants' claim was a mischaracterization

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so the judge does not cast doubt on the judge's capacity to decide impartially any issue that may come before him or her:

"(1) A judge may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.

"(2) A judge may appear at a public hearing before an executive or legislative body or official on matters concerning the law, the legal system, and the administration of justice, and may otherwise consult with an executive or legislative body or official, but only on matters concerning the administration of justice.

"(3) A judge may serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice. The judge may assist such an organization in raising funds and may participate in their management and investment, but should not personally participate in public fund raising activities. The judge may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system, and the administration of justice.

of the work of the task force as follows: "Justice Borden stated in his opening remarks to the task force that public access must be balanced against other legitimate interests, including legitimate expectations of privacy. The task force's charge and its discussions recognize that it is not, as the [defendants suggest], an either/or proposition, that is, one is either in favor of public access or in favor of the right of privacy. Rather, issues of public access involve a weighing of competing interests, including the interests of public access and privacy, with the result in any instance heavily dependent on the circumstances. In short, the facts, as presented by the [defendants], do not support the characterization that the task force is an advocacy body for the press." Judge Alander characterized the task force's focus as recommending "what the policy and law *should be* regarding public access to court records." (Emphasis added.)

In contrast, he characterized the issues in the cases pending before him as concerning "what is the *existing* law regarding public access and how does it apply to the facts of these cases." (Emphasis added.) Invoking the notion that a judge "is not, merely by having manifested his opinion on a question of law, legally disqualified from judging in a cause in which that question comes up"; *Wilson* v. *Hinkley*, 1 Kirby (Conn.) 199, 201 (1787); Judge Alander concluded that "service on a commission concerned with improving the legal system and the administration of justice, without more, is not a basis for disqualification."

Finally, Judge Alander concluded that the presence on the task force of a reporter from the Hartford Courant, one of the intervenors in the

proceedings, did not require his disqualification. Judge Alander emphasized that the defendants had not established that he actually "had any discussions with the ... reporter concerning this litigation." Although Judge Alander acknowledged that it was inappropriate for a judge and party to discuss a pending case ex parte, he held that it was "not inappropriate for them to publicly discuss ways to improve the legal system."

B

We begin our analysis with the Code of Judicial Conduct, our rules of practice and the standard under which we review a judicial authority's decision not to recuse himself or herself. Practice Book § 1-22(a) provides in relevant part: "A judicial authority shall, upon motion of either party or upon its own motion, be disqualified from acting in a matter if such judicial authority is disqualified from acting therein pursuant to [c]anon 3(c) of the Code of Judicial Conduct...." Canon 3(c)(1) of the Code of Judicial Conduct provides in relevant part: "A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned...."

We previously have observed that canon 3 of the Code of Judicial Conduct "requires a judge to disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned. The reasonableness standard is an objective one. Thus, the question is not only whether the particular judge is, in fact, impartial but whether a reasonable person would question the judge's impartiality on the basis of all the circumstances." (Internal quotation marks omitted.) *State* v. *Webb*, 238 Conn. 389, 460, 680 A.2d 147 (1996), aff'd after

remand, 252 Conn. 128, 750 A.2d 448, cert. denied, 531 U.S. 835, 121 S.Ct. 93, 148 L.Ed.2d 53 (2000); accord *Ajadi* v. *Commissioner of Correction*, 280 Conn. 514, 527, 911 A.2d 712 (2006); *State* v. *Shabazz*, 246 Conn. 746, 768-69, 719 A.2d 440 (1998), cert. denied, 525 U.S. 1179, 119 S.Ct. 1116, 143 L.Ed.2d 111 (1999); *Papa* v. *New Haven Federation of Teachers*, 186 Conn. 725, 744-46, 444 A.2d 196 (1982). Disqualification is required even when no actual bias has been demonstrated if a judge's impartiality might reasonably be questioned "because the appearance and the existence of impartiality are both essential elements of a fair exercise of judicial authority." (Internal quotation marks omitted.) *State* v. *Webb*, supra, at 460-61; see also R. Flamm, *Judicial Disqualification* (1996) § 5.4.1, p. 150 ("Judicial decisions rendered under circumstances suggesting bias or favoritism tend to breed skepticism, undermine the integrity of the courts, and generally thwart the principles upon which our jurisprudential system is based. Since an appearance of bias may be just as damaging to public confidence in the administration of justice as the actual presence of bias, acts or conduct giving the appearance of bias should generally be avoided in the same way as acts or conduct that inexorably bespeak partiality."). Indeed, prevention of the appearance of impropriety is of vital importance to the judiciary and to the judicial process. *Bonelli* v. *Bonelli*, 214 Conn. 14, 19, 570 A.2d 189 (1990). "Members of the judiciary should be acutely aware that any action they take, whether on or off the bench, must be measured against exacting standards of scrutiny to the end that public perception of the integrity of the judiciary will be preserved.... There must also be a recognition that any actions undertaken in the public

sphere reflect, whether designedly or not, upon the prestige of the judiciary.... Judges must assiduously avoid those contacts which might create even the appearance of impropriety." (Internal quotation marks omitted.) *Abington Ltd. Partnership* v. *Heublein*, 246 Conn. 815, 823, 717 A .2d 1232 (1998), aff 'd after remand, 257 Conn. 570, 778 A.2d 885 (2001).

An inquiry into the disqualification of a judge requires a sensitive evaluation of all the facts and circumstances in order to determine whether a failure to disqualify the judge was an abuse of sound judicial discretion. *Id.* In undertaking such an evaluation, we must be mindful of its intrinsic difficulties. "Judges who are asked to recuse themselves are reluctant to impugn their own standards. Likewise, judges sitting in review of others do not like to cast aspersions. Yet drawing all inferences favorable to the honesty and care of the judge whose conduct has been questioned could collapse the appearance of impropriety standard ... into a demand for proof of actual impropriety." (Internal quotation marks omitted.) *United States* v. *Jordan*, 49 F.3d 152, 157 (5th Cir. 1995).

Turning to the present case, in our judgment, a reasonable person knowing all of the facts would not conclude that Judge Alander's service on the task force jeopardized his impartiality. A trial judge has no affirmative duty to step down from a case merely on the basis of membership on a task force unless the agenda of the task force is inconsistent with the judge's duty to judge impartially. Case law confirms that service on a commission concerned with improving the legal system and the administration of justice, without more, is not a basis for

disqualification, even if the subject matter generally relates to the area of the law at issue in the case at hand. See *United States* v. *Glick*, 946 F.2d 335, 337 (4th Cir. 1991) (appellate judge's service as chairman of commission that recommended sentencing guidelines did not necessitate disqualification, upon defendant's motion, in appeal brought by government after trial court departed from sentencing guidelines); *United States* v. *Payne*, 944 F.2d 1458, 1476 (9th Cir. 1991) (trial judge's participation on attorney general's commission on pornography did not necessitate disqualification from case alleging carnal knowledge of female under age of sixteen), cert. denied, 503 U.S. 975, 112 S.Ct. 1598, 118 L. Ed. 2d 313 (1992); *State* v. *Haskins*, 573 N.W.2d 39, 45 (Iowa App. 1997) (trial judge's service on domestic abuse coalition did not require recusal in criminal case alleging domestic violence when coalition's work did not look "to a particular case but to improve the general framework of the system"); *State* v. *Carlson*, 66 Wash. App. 909, 912, 833 P.2d 463 (1992) (trial judge's participation in Kid's Court, program designed to prepare children who were victims of sexual abuse to testify in court, did not warrant disqualification from criminal trial for child rape), review denied, 120 Wash. 2d 1022, 844 P.2d 1017 (1993); see also *State* v. *Montini*, 52 Conn.App. 682, 695-96, 730 A.2d 76 (affirming denial of motion to disqualify judge who was " 'nationally known advocate for children's rights,' " because he was cofounder of national task force for children's constitutional rights, had served on Connecticut Bar Association crime victims' committee and was chairman of subcommittee on child victims in criminal trial involving sexual assault of child), cert. denied, 249 Conn. 909, 733 A.2d 237 (1999).

Indeed, canon 4 of the Code of Judicial Conduct explicitly authorizes judges to engage in activities to improve the law, the legal system and the administration of justice. See footnote 17 of this opinion. The policy reason underlying the rule that mere participation on a commission dedicated to improving the legal system is insufficient to require disqualification is a compelling one. "To hold otherwise would deprive the citizens of this state of the knowledge and experience which a judge brings to groups designed to improve the legal system." *State* v. *Knowlton*, 123 Idaho 916, 920, 854 P.2d 259 (1993).

Courts likewise have held that a judge's expertise on and exposure to a subject by virtue of service on a commission does not necessitate recusal on a case raising an issue on that same subject. See *Laird* v. *Tatum*, 409 U.S. 824, 835, 93 S.Ct. 7, 34 L.Ed.2d 50 (1972) (memorandum by Rehnquist, J., on motion to recuse) ("[p]roof that a Justice's mind ... was a complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias"); *Southern Pacific Communications Co.* v. *American Telephone & Telegraph Co.*, 740 F.2d 980, 991 (D.C.Cir. 1984) ("As long as the judge is capable of refining his views ... and maintaining a completely open mind to decide the facts and apply the applicable law to the facts, personal views on law and policy do not disqualify him from hearing the case. The test may be stated in terms of whether the judge's mind is 'irrevocably closed' on the issues as they arise in the context of the specific case."), cert. denied, 470 U.S. 1005, 105 S. Ct. 1359, 84 L. Ed. 2d 380 (1985); *Assn. of National Advertisers, Inc.* v. *Federal Trade Commission*, 627 F.2d 1151, 1174 (D.C.Cir. 1979)

("[a]dministrators, and even judges, may hold policy views on questions of law prior to participating in a proceeding"), cert. denied, 447 U.S. 921, 100 S.Ct. 3011, 65 L.Ed.2d 1113 (1980); see also *United States* v. *Conforte*, 624 F.2d 869, 882 (9th Cir.) ("judge's views on legal issues may not serve as the basis for motions to disqualify"), cert. denied, 449 U.S. 1012, 101 S.Ct. 568, 66 L. Ed. 2d 470 (1980).

The decision by Second Circuit Court of Appeals in *United States* v. *Pitera*, 5 F.3d 624 (2d Cir. 1993), cert. denied, 510 U.S. 1131, 114 S.Ct. 1103, 127 L. Ed. 2d 415 (1994), is instructive. The defendant in that case had moved for the trial judge's recusal from the United States District Court on the basis of a videotaped lecture she had given to members of the New York/New Jersey region of the Organized Crime Drug Enforcement Task Force. *Id.*, at 626. The lecture had been given seven months before the defendant's trial, but after the case had been assigned to the judge. *Id.* During the lecture, the judge made no reference to the defendant's case, but had included advice to the assembled agents and prosecutors about steps they might take to increase the prospects for conviction in narcotics cases and had urged them to take such steps. *Id.* The trial judge denied the defendant's recusal motion. *Id.*

On appeal to the Second Circuit, the defendant focused his attention on the particulars of the trial judge's remarks to the task force, asserting that they were "so pointed in conveying not only techniques for obtaining convictions but also the desirability of such outcomes that [her] impartiality 'might reasonably be questioned,' [pursuant to] 28 U.S.C. § 455(a) (1988)." *United States* v. *Pitera*, supra, 5 F.3d at 626. In applying the proper standard for recusal-whether

a reasonable person, knowing all the facts, would conclude that the court's impartiality " 'might reasonably be questioned' "-the Second Circuit concluded that two significant matters provided important context for the challenged aspects of the trial judge's remarks. *Id.* First, there were parts of the lecture to the task force that "included several emphatic criticisms of prosecutors that would lead a reasonable person not to question, but to have confidence in the [j]udge's impartiality." *Id.* Second, two months after giving the lecture to the task force, the trial judge had participated in a program for criminal defense lawyers, and the following year, she had participated in the annual retreat of another organization for defense lawyers. *Id.*

Similarly, in the present case, we conclude that Judge Alander did not abuse his discretion by denying the motion to recuse because a reasonable person with knowledge of all the facts would not determine that his impartiality reasonably might be questioned on the basis of his service on the task force. The task force's enumerated responsibilities expressly included a balance of the public's interest in access to the court system against other legitimate interests, *including legitimate expectations of privacy and confidentiality.* There was no specific agenda with respect to any particular case or even type of case. Indeed, Judge Alander's comments at the opening meeting of the task force suggested that he was concerned about privacy and confidentiality interests.[18] Judge Alander was able to "propose legal

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[18] It was reported that Judge Alander had suggested, inter alia, that the task force revisit the issue of the automatic unsealing of financial affidavits once their contents had become the basis

reform without compromising his capacity to decide impartially the very issue on which he has spoken or written." E. Thode, Reporter's Notes to Code of Judicial Conduct (1973) p. 74. Mere membership in the task force would not justify a belief that Judge Alander could not be fair.

In light of the case law that we have examined, both from our own precedents and from our sister tribunals, we can conceive of no reason to depart from the rule that membership in a task force concerning a particular legal issue does not justify the disqualification of a judge simply because the judge's service happens to be coincident with his participation in a case dealing with the same issue. It is the responsibility of any judge to evaluate historical facts in light of applicable law. There is no reason to suggest that a judge who is exposed to information concerning potential future changes to the law while he is presiding over a case that implicates existing law in that area compromises his ability to be impartial.[19] Judges are not required to

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of a dispute. T. Scheffey, "Judges Annual Meeting Open to Public," 32 Conn. L. Trib. No. 23, May 29, 2006, p. 6.

[19] Although the dissent acknowledges that any rule changes suggested by the task force would have a *prospective* effect once they formally were adopted by the judicial branch, it posits that the appearance of impropriety could arise because Judge Alander could have been called upon to apply and interpret those rules if they became effective by the time that the underlying actions in the present case were litigated. Because any judge assigned to the case would be required to apply those rules if they were then effective, we fail to see how this fact creates an appearance of impropriety. Indeed, judges who serve on committees drafting rules of evidence and rules of practice routinely sit on cases requiring the application and interpretation of those rules.

abstain from the obligations of daily living or professional development for fear that they should somehow lose their ability to adjudicate a legal issue fairly. Such a requirement not only would render judicial service impossible but also would "deprive the citizens of this state of the knowledge and experience which a judge brings to groups designed to improve the legal system." *State* v. *Knowlton*, supra, 123 Idaho at 920. The defendants point to no case law, nor have we found any, that indicates that we should reach a different outcome simply because Judge Alander served on the task force concurrently with his adjudication of the motions at hand, rather than prior to the adjudication. We are not persuaded that Judge Alander's service on the task force would have compromised his ability to be objective simply because it happened to be simultaneous, rather than in the immediate or far past. Accordingly, in light of all of the considerations that the task force was charged with taking into account, we conclude that no reasonable observer would have inferred that Judge Alander could not be impartial.

In essence, the defendants' claim boils down to the proposition that any judge who has served on the task force should recuse himself or herself from a case raising issues relating to sealing court records. "To state [the defendants'] argument is to refute it. The people of this state will be best served by a legal system which encourages judges to enhance their own and others' awareness of legal issues and develop their legal knowledge and skills. Without any support for [their] argument, [the defendants confuse] a judge's efforts to improve the legal system with an assumption of biased advocacy which prevents a judge from exercising the independent judgment and consideration required in the exercise

of the judge's professional responsibilities." *State* v. *Carlson*, supra, 66 Wash.App. at 913; see also *State* v. *Knowlton*, supra, 123 Idaho at 920 ("our citizenry would also suffer if we discouraged our judiciary from heightening their knowledge and awareness of legal issues through participation in groups such as the [task force]").

To the extent that the defendants contend that the presence of a reporter for one of the intervenors could give rise to an appearance of a lack of impartiality because an observer might question whether there had been ex parte communications, we wholly disagree. Canon 3(a)(4) of the Code of Judicial Conduct provides in relevant part that, with the exception of specifically enumerated circumstances, "[a] judge shall not initiate, permit or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding...." A reasonable observer would not conclude that Judge Alander would have disregarded this clear mandate simply because he and Griffin, the Hartford Courant reporter, served on the task force. Therefore, Judge Alander did not abuse his discretion in denying the defendants' motion to recuse himself.

II

The defendants' second claim is that the trial court improperly determined that, because the documents protected by the sealing orders were "filed with the court" in accordance with Practice Book § 11-20A (a), the documents were subject to a presumption of public access for purposes of determining whether to vacate those orders. Specifically, they contend that: (1) the presumption

of public access set forth in § 11-20A applies only to judicial documents, which they assert are limited to "pleadings and evidence that are the subject of a judicial ruling on the merits"[20]; (2) the presumption favoring public access for any documents that properly could have been considered to be judicial documents should have been balanced against countervailing interests in accordance with the practice followed by the Court of Appeals for the Second Circuit; see footnote 34 of this opinion; which weighed against disclosure; and (3) the presumption of public access was extinguished with respect to the documents in question once their destruction was authorized under Practice Book §§ 7-10 and 7-21.[21]

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[20] The defendants also suggest that, to the extent that Practice Book § 11-20A allows a broader right of access to public documents than the common-law presumption does, it is inapplicable to the documents at issue because § 11-20A was adopted after the documents were filed and the cases were withdrawn. In essence, the defendants contend that § 11-20A cannot be applied retroactively to them. Because we conclude that § 11-20A merely codified the common law, we need not address this contention.

[21] Practice Book § 7-10 provides that "[t]he files in all civil, family and juvenile actions, including summary process and small claims, which, before a final judgment has been rendered on the issues, have been terminated by the filing of a withdrawal or by a judgment of dismissal or nonsuit when the issues have not been resolved on the merits or upon motion by any party or the court, or in which judgment for money damages only has been rendered and a full satisfaction of such judgment has been filed, may be destroyed upon the expiration of one year after such termination or the rendition of such judgment."

Practice Book § 7-21 provides that "[u]nless otherwise ordered by the judicial authority, it is the duty of attorneys and pro se parties, upon the final determination of any civil case, to

In response, the intervenors contend that the trial court properly concluded, in accordance with § 11-20A, that all documents filed with the court are presumptively open to the public.[22] They further claim that, even if the presumption is limited to judicial documents, the documents at issue fall into that category because, as this court stated in *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, supra, 276 Conn. at 217, judicial documents are "documents that have been submitted to the court for its review in the discharge of the court's adjudicatory function," a more expansive definition that encompasses the documents at issue. Finally, they claim that the authorization for destruction of documents under Practice Book §§ 7-10 and 7-21 does not strip the presumption of public access from judicial documents if they still are in the court's possession, as in the present case.

We conclude that § 11-20A codifies the common-law presumption of public access to judicial documents, meaning any document filed with the court that the court reasonably could rely on in support of its adjudicatory function. We conclude that, with the exception of fifteen documents we subsequently identify in part II C of this opinion; see footnote 33 of this opinion; the documents at issue are judicial documents. We further conclude that the

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remove from the courthouse all exhibits that have been entered into evidence, briefs, depositions, and memoranda and, if not so removed, such items may be destroyed by the clerk four months after the final determination of the case, without notice."

[22] We note that the intervenors did not assert any first amendment right of access to the documents in question. We therefore confine our analysis to the presumption of access as provided by the rules of practice in light of the common law.

trial court was not required to employ the Second Circuit's balancing test when considering whether to grant the motion to vacate the protective orders. Finally, we conclude that §§ 7-10 and 7-21 did not terminate the presumption of public access by operation of law because the documents remained in the possession of the court.

The record reveals the following additional undisputed facts and procedural history that are relevant to our resolution of this claim. In 1994, the defendants moved for sealing orders concerning, inter alia, information obtained through deposition testimony and requested that information gained in discovery be restricted from the public. Following a hearing, the trial court, Levin, J., found that the defendants' right to a fair trial would be jeopardized by the public disclosure of such information. Accordingly, the trial court concluded that sealing orders were warranted and issued a protective order that provided the following three restrictions: "1. Until further order of this court, which order shall be made not later than the completion of jury selection, all information, documents and transcripts which the parties may obtain through the depositions of the defendants ... and Bishop Edward Egan [specifically] shall not be disseminated, shown, disclosed, divulged or transmitted by any one to any person or organization other than the parties to this lawsuit and their respective attorneys and to any investigators and potential expert witnesses retained by the parties to this lawsuit or their attorneys and stenographic personnel with a need and obligation to see and receive the same....

"2. All such documents and transcripts which the attorneys representing any of the parties believe in

good faith may be entitled to protection from disclosure after the completion of jury selection, shall be marked 'CONFIDENTIAL: SUBJECT TO COURT ORDER' and shall be submitted to the court for review and appropriate order before being released from the protection afforded by this order.

"3. Whenever any pleading, document or motion referencing, incorporating or attaching any documents described in paragraph one of this order is filed with the court or delivered to any judge thereof, it shall be filed or delivered under seal pending review by the court or judge and shall be marked by the party filing or delivering same 'CONFIDENTIAL: SUBJECT TO COURT ORDER.' " *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, Superior Court, judicial district of Fairfield, Docket No. CV-93-0300272S (December 8, 1994).

Thereafter, the parties conducted discovery and submitted numerous documents to the court marked "CONFIDENTIAL: SUBJECT TO COURT ORDER" in accordance with the order. These filings included motions or documents submitted in support of motions to be adjudicated by the trial court,[23] as well as documents that were not marked in support of

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[23] We note that, in some instances, transcripts of entire depositions were filed in support of motions, although the motions or supporting memoranda of law referenced only a few pages of those transcripts. For example, the plaintiffs in the underlying cases filed three volumes of transcripts of deposition testimony from Bishop Walter W. Curtis in support of the plaintiff's objections to the defendants' motions for summary judgment. The three volumes totaled more than 250 pages, and the plaintiffs' opposition referred to only a fraction of these pages.

any particular motion or other judicial action.[24] In all, approximately 12,675 pages of documents were submitted to the court. In 2001, the parties settled the twenty-three underlying actions, and the cases were withdrawn. In 2002, the four newspaper publishing companies; see footnote 2 of this opinion; filed motions as intervenors to obtain access to those documents. The documents filed with the court in connection with those actions remained in the court's possession.

After the newspaper publishing companies had been granted intervenor status and the cases had been remanded from this court, the trial court, *Alander, J.*, held a hearing on the intervenors' motion to vacate the sealing orders and the defendants' motion for a new protective order. In support of their contentions that the documents at issue were not presumptively open to the public and were, in any event, protected by certain evidentiary privileges, the defendants submitted "judicial documents logs" and "privileges logs" for the court's review. The judicial document logs listed each document in the court's file, identifying the filing date and type of document and whether it was, in the defendants' view, a judicial document and the basis for that characterization.[25] The privileges logs

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[24] For example, on February 5, 1997, the defendants filed a "Notice of Filing Under Seal," which provided: "This is to certify that within the attached envelope, the undersigned defendants are filing the Responsive Affidavit of Reverend Msgr. Laurence R. Bronkiewicz." Nothing in the text of the document indicates whether the affidavit was filed in support of a particular motion or the reason why it was filed.

[25] For example, one entry from a judicial document log identified a document as the personnel file of an individual

similarly set forth the basis for any privileges that the defendants claimed to apply to the individual documents.

Following a hearing on the motions, the trial court issued a memorandum of decision granting in part the intervenors' motion to vacate the sealing orders and denying the defendants' motion to issue new protective orders. The court relied exclusively on Practice Book § 11-20A (a), which in the court's view "decreed that the public has a presumptive right of access to any document filed with the court." Because the documents in question had been filed with the court, they presumptively were open to the public pursuant to § 11-20A (a). Consequently, after considering the countervailing interests and any claims of privilege, issues that we address in parts III and IV of this opinion, the court granted in large part the motion to unseal the documents.[26]

As a preliminary matter, we note that the question of what constitutes a document subject to

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priest and provides: "This individual priest's personnel file was submitted to the court (*Levin, J.*) for an in camera inspection in connection with a hearing held on October 3, 1994 regarding the defendants' motions for protective orders.... Consequently, these documents were never relied upon for a determination of a dispositive motion addressing the merits of the case. Therefore, this priest's personnel file does not constitute a judicial document."

[26] As we previously have noted, the trial court denied the intervenors' motion to vacate the sealing orders with respect to documents submitted to the court for an in camera review, documents protected under certain health care privileges and those portions of the depositions that identified Reverend John Doe I and Reverend John Doe II. The intervenors have not challenged these aspects of the trial court's decision, and they are not at issue in this appeal.

the presumption of public access is a question of law that is squarely presented to this court for the first time. As such, our review is plenary. *Wexler* v. *DeMaio*, 280 Conn. 168, 181, 905 A.2d 1196 (2006) ("[b]ecause the propriety of that finding necessarily depends on the propriety of the trial court's legal conclusion concerning the breadth of disclosure required by [General Statutes] § 13-4[4], our review is plenary"); *State* v. *Zaporta*, 237 Conn. 58, 64 n.5, 676 A.2d 814 (1996) ("[b]ecause the proper construction of a Practice Book section involves a question of law, our review of the Appellate Court's determination is plenary"). Accord *Commonwealth* v. *Upsure*, 592 Pa. 273, 280, 924 A.2d 642 (2007) ("the determination of whether an item will be considered a public judicial record or document subject to the common law right of access is a question of law, for which the scope of review is plenary").

A

To evaluate the merits of the defendants' claims, we must determine the extent to which documents filed with the court are presumptively open to the public. We begin our analysis with a discussion of the common-law principles underlying the presumption of public access to court documents.

Public access to court documents traces its roots back centuries through the common law, stemming from the practice of open trials. *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 564, 100 S.Ct. 2814, 65 L. Ed. 2d 973 (1980). In the days before the Norman Conquest, public participation at criminal trials was an inherent part of the court system, as "the freemen of the community, who represented the 'patria,' or the 'country,' " and were required to attend, were responsible for rendering

judgment at trial. *Press-Enterprise Co.* v. *Superior Court of California*, 464 U.S. 501, 505, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984). Over the centuries, trials remained open, and those not in attendance could be assured that community standards of justice and procedural norms would be enforced by those present. *Id.*, at 507-509.

This tradition of open trials made its way to colonial America and evolved into a presumption of public access to court proceedings and records that remains a fundamental part of our judicial system today. *Id.*, at 508; *Nixon* v. *Warner Communications, Inc.*, 435 U.S. 589, 597, 98 S. Ct. 1306, 55 L.Ed.2d 570 (1978); *In re Oliver*, 333 U.S. 257, 266-68, 68 S.Ct. 499, 92 L. Ed. 682 (1948). The rationale underlying the presumption is straightforward: Public monitoring of the judicial process through open court proceedings and records enhances confidence in the judicial system by ensuring that justice is administered equitably and in accordance with established procedures. *United States* v. *Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995). "[T]he bright light cast upon the judicial process by public observation diminishes the possibilities for injustice, incompetence, perjury and fraud. Furthermore, the very openness of the process should provide the public with a more complete understanding of the judicial system and a better perception of its fairness." (Internal quotation marks omitted.) *Leucadia, Inc.* v. *Applied Extrusion Technologies, Inc.*, 998 F.2d 157, 161 (3d Cir. 1993).

This presumption of public access, however, is not absolute. *Nixon* v. *Warner Communications, Inc.*, supra, 435 U.S. at 598; *Doe* v. *Connecticut Bar Examining Committee*, 263 Conn. 39, 66, 818 A.2d 14

(2003). When the public's interest in judicial monitoring is outweighed by countervailing considerations, such as certain privacy concerns,[27] or if access is sought for "improper purposes"; *Nixon* v. *Warner Communications, Inc.*, supra, at 598; court documents or proceedings may be shielded from public view. *Press-Enterprise Co.* v. *Superior Court*, supra, 464 U.S. at 510; see *Doe* v. *Connecticut Bar Examining Committee*, supra, at 66; see also *Vargas* v. *Doe*, 96 Conn.App. 399,406-407,900 A.2d 525 (2006) (reviewing statutory exceptions allowing closed proceedings), cert. denied, 280 Conn. 923, 908 A.2d 546 (2006).

With respect to documents, the presumption of public access never has extended to every document generated in the course of litigation. *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20, 32-33, 104 S. Ct. 2199, 81 L. Ed. 2d 17 (1984). For example, raw discovery materials exchanged among parties, but not filed with the court, are not open to the public. *Id.* Discovery proceedings never were open to the public at common law; *id.*, at 33; and the principles supporting liberal discovery are distinct from those supporting public access to court documents.

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[27] Certain privacy concerns that outweigh the public's interest in judicial monitoring have been codified by statute or in the rules of practice. See, e.g., General Statutes § 46b-49 (private hearings in family-related matters permitted when "in the interests of justice and the persons involved"); General Statutes § 54-76c (court files sealed from public access in certain criminal prosecutions of youthful offenders); General Statutes § 54-86f (in camera hearing concerning evidence of sexual conduct of victim permitted during prosecution for sexual assault); Practice Book § 25-59A (h) (financial affidavits filed in family matters automatically sealed unless financial matters in dispute).

Anderson v. *Cryovac, Inc.*, 805 F.2d 1, 12 (1st Cir. 1986); *Mokhiber* v. *Davis*, 537 A.2d 1100, 1109 (D.C. 1988). Parties are obligated to disclose a wide range of information in the course of discovery to support the disposition of their underlying claims. See *Joy* v. *North*, 692 F.2d 880, 893 (2d Cir. 1982), cert. denied sub nom. *Citytrust* v. *Joy*, 460 U.S. 1051, 103 S. Ct. 1498, 75 L. Ed. 2d 930 (1983). Much of this material may be related only tangentially to the ultimate resolution of the issues presented and may have little to no impact on judicial action. *Seattle Times Co.* v. *Rhinehart*, supra, at 33; *Lugosch* v. *Pyramid Co. of Onondaga*, 435 F.3d 110, 125 (2d Cir. 2006); see *United States* v. *Amodeo*, supra, 71 F.3d at 1048 (discussing flood of material generated by litigation and its relevance to exercise of judicial power). The principles underlying public access, therefore, are inapplicable to such material, and consequently, unfettered access to discovered material not filed with the court never has been the norm.[28]

Likewise, not all documents in the court's possession are presumptively open. The presumption of public access applies only to "judicial" documents

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[28] In addition, there are countervailing reasons why the presumption of public access should not apply to the fruits of raw discovery. *Seattle Times Co.* v. *Rhinehart*, supra, 467 U.S. at 33; *Lugosch* v. *Pyramid Co. of Onondaga*, supra, 435 F.3d at 124. Public access to such documents might have unintended adverse effects. Under the threat of public disclosure of all discovery, parties might more vigorously contest discovery requests. "[C]ourts would face intensified protective order litigation in any case potentially of interest to third parties," consuming scarce judicial resources, and in response, courts supervising the discovery process would likely narrow the parties' access to information. *Mokhiber* v. *Davis*, supra, 537 A.2d at 1111.

and records. *Nixon* v. *Warner Communications, Inc.*, supra, 435 U.S. at 597; see, e.g., *United States* v. *Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995) (noting that public access to judicial documents predates federal constitution and discussing approaches to classifying documents as judicial documents); *Leucadia, Inc.* v. *Applied Extrusion Technologies, Inc.*, supra, 998 F.2d at 161 ("[t]he existence of this right ... [to access judicial documents] is now beyond dispute" [internal quotation marks omitted]); *Anderson* v. *Cryovac, Inc.*, supra, 805 F.2d at 13 ("[t]here is a long-standing presumption in the common law that the public may inspect judicial records"); *United States* v. *Martin*, 746 F.2d 964, 968 (3d Cir. 1984) ("[t]he common law right of access is not limited to evidence, but rather encompasses all judicial records and documents" [internal quotation marks omitted]); *Mokhiber* v. *Davis*, supra, 537 A.2d at 1108-1109 ("common law right of access ... does not necessarily apply to all documents that one might arguably term 'court records' relating to a lawsuit" [citation omitted]); *Shenandoah Publishing House, Inc.* v. *Fanning*, 235 Va. 253, 258, 368 S.E.2d 253 (1988) ("a rebuttable presumption of public access applies in civil proceedings to judicial records"). Such documents provide a surrogate to assist the public in monitoring the judicial process when it cannot be present. *United States* v. *Amodeo*, supra, 71 F .3d at 1048. Therefore, when determining whether a document should be open to the public, the threshold question under the common law is whether the document constitutes a " 'judicial document.' " *Lugosch* v. *Pyramid Co. of Onondaga*, supra, 435 F.3d at 119 ("[b]efore any such common law right [of public access] can attach, however, a court must first conclude that the documents at issue are indeed

'judicial documents' "); accord *Commonwealth* v. *Upshur*, supra, 592 Pa. at 282 ("[N]ot all documents and materials utilized during court proceedings are subject to the right of access. The threshold question in any case involving the common law right of access is whether the documents sought to be disclosed constitute public judicial documents." [Internal quotation marks omitted.]).

Courts have employed three general approaches to determine what constitutes a judicial document. The first approach construes judicial documents narrowly, limited to those documents relied upon to determine a litigant's "*substantive* rights." (Emphasis added.) *Anderson* v. *Cryovac, Inc.*, supra, 805 F.2d at 13; accord *Smith* v. *United States District Court*, 956 F.2d 647, 650 (7th Cir. 1992); *Federal Trade Commission* v. *Standard Financial Management Corp.*, 830 F.2d 404, 408-409 (1st Cir. 1987). The rationale for this narrow construction is that, when no substantive rights are affected, there is no judicial action that warrants monitoring. Therefore, the presumption of public access is not triggered.

Courts following this approach have held that financial statements submitted in support of a judge's review of a consent decree; *Federal Trade Commission* v. *Standard Financial Management Corp.*, supra, 830 F.2d at 409; a law clerk's memorandum read in open court during the adjudication of a motion to extend time; *Smith* v. *United States District Court*, supra, 956 F.2d at 650; and records of hearings and evidence introduced in support of a motion to terminate; *In the Matter of Continental Illinois Securities Litigation*, 732 F.2d 1302, 1309 (7th Cir. 1984); are judicial documents

because they reasonably could be relied upon by the trial court to reach a determination affecting substantive rights. In contrast, material filed in support of motions concerning discovery disputes has been held by such courts not to be judicial documents because, in the view of these courts, discovery proceedings do not affect substantive rights, and, therefore, there is no meaningful judicial action to trigger the presumption of public access. *Anderson* v. *Cryovac, Inc.*, supra, 805 F.2d at 13-14.

A second approach construes judicial documents more broadly. Under this approach, documents that are filed with the court that reasonably may be relied upon in support of any part of the court's adjudicatory function are judicial documents. *United States* v. *Amodeo*, supra, 44 F.3d at 145 ("the item filed must be relevant to the performance of the judicial function and useful in the judicial process"); accord *Mokhiber* v. *Davis*, supra, 537 A.2d at 1111-12 (noting that presumption of public access attaches to all material filed with court "germane to a court's ruling" on decisions of "major importance to the administration of justice" [internal quotation marks omitted]); *Associated Press* v. *New Hampshire*, 153 N.H. 120, 134, 888 A.2d 1236 (2005) (examining state constitutional provisions mandating public access to court proceedings and concluding that right "attaches only to those documents that are important and relevant to a determination made by the court in its adjudicatory function"); *Commonwealth* v. *Upshur*, supra, 592 Pa. at 282 ("any item that is filed with the court as part of the permanent record of a case and relied on in the course of judicial decision-making will be a public judicial record or document"). Under this approach, documents relevant to any judicial determination implicate the policies behind

the presumptive right of access, and, thus, the presumption encompasses documents supporting any decisions reached by the judicial authority, not simply those affecting substantive rights.

Courts applying this analysis have construed judicial documents to include ones filed in support of summary judgment motions, regardless of whether the motion has been granted, denied or even adjudicated; *Lugosch* v. *Pyramid Co. of Onondaga*, supra, 435 F.3d at 121; status reports filed by court officers in connection with a court-mandated investigation; *United States* v. *Amodeo*, supra, 44 F.3d at 146; audio recordings played in open court; *Commonwealth* v.. *Upshur*, supra, 592 Pa. at 287; arrest warrant affidavits filed with a magistrate; *Commonwealth* v. *Upshur*, supra, at 282; and financial affidavits filed in connection with cases involving financial matters. *Associated Press* v. *New Hampshire*, supra, 153 N.H. at 134. Indeed, even materials filed in support of discovery motions have been held to be judicial documents. *Mokhiber* v. *Davis*, supra, 537 A.2d at 1111. In *Mokhiber*, the Court of Appeals for the District of Columbia noted that, because discovery motions have a significant impact on the eventual resolution of disputes, the public has an interest in monitoring such proceedings. *Id.*, at 1112. Although the court recognized that a party might prefer to keep discovered material private, it reasoned that, "[b]y submitting pleadings and motions to the court for decision, one enters the public arena of courtroom proceedings and exposes oneself, as well as the opposing party, to the risk, though by no means the certainty, of public scrutiny." *Id.*

In what arguably could be deemed a third approach, courts have provided the definition of judicial documents in the broadest possible language, stating that the act of filing a document with the court in connection with a pending matter renders it a judicial document. See, e.g., *Leucadia, Inc.* v. *Applied Extrusion Technologies, Inc.*, supra, 998 F.2d at 161-62 ("the filing of a document gives rise to a presumptive right of public access"); accord *San Jose Mercury News, Inc.* v. *United States District Court*, 187 F.3d 1096, 1102 (9th Cir. 1999) (holding that there is presumptive right of access to pretrial documents filed in civil cases and those filed prior to judgment in criminal cases); *United States* v. *Martin*, supra, 746 F.2d at 968 (holding that judicial records and documents include "transcripts, evidence, pleadings, and other materials *submitted* by litigants" [emphasis added; internal quotation marks omitted]); *Shenandoah Publishing House, Inc.* v. *Fanning*, supra, 235 Va. at 257 (noting that judicial records include "the pleadings and any exhibits or motions filed by the parties and all orders entered by the trial court in the judicial proceedings leading to the judgment under review"); *Rufer* v. *Abbott Laboratories*, 154 Wash. 2d 530, 549, 114 P.3d 1182 (2005) (holding that presumption of public access applies to "any records that were filed with the court in anticipation of a court decision"). The stated rationale behind this approach is that the public's interest in judicial monitoring extends not only to whether the judiciary reaches legally sound *results* but also to the entire judicial process itself, which includes "all records the court has considered in making *any* ruling...." (Emphasis in original.) *Rufer* v. *Abbott Laboratories*, supra, at 549. Courts using the broad "filing" language, therefore, have held that

judicial documents include settlement agreements filed with the court; *Pansy* v. *Stroudsburg*, 23 F.3d 772, 782 (3d Cir. 1994); *Shenendoah Publishing House, Inc.* v. *Fanning*, supra, at 260; summary judgment motions and their supporting exhibits; *San Jose Mercury News, Inc.* v. *United States District Court*, supra, at 1102; *Leucadia, Inc.* v. *Applied Extrusion Technologies, Inc.*, supra, at 164; nondiscovery related pretrial motions, including motions for preliminary injunctions, motions to dismiss and their supporting documents; *Leucadia, Inc.* v. *Applied Extrusion Technologies, Inc.*, supra, at 164; and deposition transcripts attached to motions. *Rufer* v. *Abbott Laboratories*, supra, at 541.

Despite employing this broad language, however, these jurisdictions have interpreted the language more narrowly than might be expected. The Court of Appeals for the Third Circuit precluded public access to discovery materials filed in support of discovery related motions. *Leucadia, Inc.* v. *Applied Extrusion Technologies, Inc.*, supra, at 998 F.2d 163-64. The Third Circuit reasoned that, because unfiled raw discovery material is not presumptively open to the public; *Seattle Times Co.* v. *Rhinehart*, supra, at 467 U.S. 32-33; it would be improper to transform such material into public information merely by virtue of it being attached to a motion concerning discovery. *Id.*, at 33. Another court has denied access to depositions that were filed with the court but not used at trial or attached in support of any motion, reasoning that information that is not actually used in the judicial process does not enhance the public's interest in judicial monitoring. *Rufer* v. *Abbott Laboratories*, supra, at 154 Wash. 2d 541, 550-51.

Regardless of approach, however, it is clear that the common-law presumption of public access to documents in the court's possession is grounded in the public's interest in monitoring the judicial process. Such access enhances public confidence that the judicial system is operating fairly, impartially and in accordance with established norms. This presumption is not absolute and applies only to "judicial documents" because such documents serve as a proxy for public monitoring of court proceedings when the public cannot be present. While courts have employed various approaches to determine what constitutes a judicial document, the clear trend has been toward greater, but not unfettered, access to documents filed with the court in connection with a court proceeding. Although a minority of courts apply a common-law rule limiting judicial documents to those connected with decisions affecting substantive rights, the vast majority of courts examines whether the document filed reasonably may be relied upon in support of the adjudicatory process, regardless of whether the decision is a dispositive one. With these principles in mind, we turn to the common law in Connecticut and the rules of practice, as they apply to the issues in this appeal.

B

Although this court has not had occasion to consider this issue substantively, in *Rosado*, this court recognized certain general principles. "[The] supervisory role of the court in relation to its own files is an especially important one insofar as it pertains to files that contain judicial documents-that is, documents that have been submitted to the court for its review in the discharge of the court's adjudicatory function-because [t]he public has a

common law presumptive right of access to [such] documents ... and likely a constitutional one as well." (Internal quotation marks omitted.) *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, supra, 276 Conn. at 216-17. We further explained: "As to the issue of what documents are judicial documents, we agree generally that the mere filing of a paper or document with the court is insufficient to render that paper a judicial document subject to the right of public access.... [T]he item filed must be relevant to the performance of the judicial function and useful in the judicial process in order for it to be designated a judicial document. *United States* v. *Amodeo*, supra, 44 F.3d at 145. Whatever the precise parameters of that category of documents may be, however, we also agree that the presumptive right to public observation is at its apogee when asserted with respect to documents relating to matters that directly affect an adjudication. *Gambale* v. *Deutsche Bank AG*, [377 F.3d 133, 140 (2d Cir. 2004)], quoting *United States* v. *Amodeo*, [supra, 71 F.3d at 1049]." (Internal quotation marks omitted.) *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, supra, at 217 n.54. This discussion, albeit dicta in that case, suggests that Connecticut employs the broader approach followed by the majority of jurisdictions. See also *Clerk of the Superior Court* v. *Freedom of Information Commission*, 278 Conn. 28, 53, 895 A.2d 743 (2006) (*Palmer, J.*, concurring) ("[the plaintiff] has a presumptive right of access to ... all ... documents in the possession of the court that *relate to its adjudicative function*" [emphasis added]).

In *Rosado*, however, we did not state expressly whether we were discussing the common law or the rules of practice. Practice Book § 11-20A (a) provides that, "[e]xcept as otherwise provided by law, there

shall be a presumption that documents filed with the court shall be available to the public." For the reasons that follow, it is clear that the rules of practice codify the common-law presumption of public access such that the language "filed with the court" signifies judicial documents.

It has long been understood that Practice Book provisions are not intended to enlarge or abrogate substantive rights. See General Statutes § 51-14(a) (noting that rules of practice and procedure "shall not abridge, enlarge or modify any substantive right or the jurisdiction of any of the courts"); *In re Samantha C.*, 268 Conn. 614, 639, 847 A.2d 883 (2004) ("we are obliged to interpret [the rules of practice] so as not to create a new right, but rather to delineate whatever rights may have existed, statutorily or otherwise, at the time of the proceedings underlying the present appeal"). Accordingly, this court has interpreted provisions of the Practice Book through the lens of the common law. See, e.g., *State* v. *Blake*, 289 Conn. 586, 588 n.2, 958 A.2d 1236 (2008) (recognizing that Practice Book § 43-10 codifies common-law right of allocution); *State* v. *Colon*, 272 Conn. 106, 303-11, 864 A.2d 666 (2004) (examining common-law right of allocution to determine extent of right of allocution provided by Practice Book provision), cert. denied, 546 U.S. 848, 126 S. Ct. 102, 163 L. Ed. 2d 116 (2005); *Dunham* v. *Dunham*, 217 Conn. 24, 33, 584 A.2d 445 (1991) (stating that common-law doctrine of plain error is codified in Practice Book provision); *State* v. *DeVivo*, 106 Conn.App. 641, 644 n.4, 942 A.2d 1066 (2008) (noting that Practice Book § 39-26 recognizes common-law grant of jurisdiction rather than creating new jurisdictional avenue).

As we have explained in part II A of this opinion, the common law creates substantive rights of public access to court records. *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, supra, 276 Conn. at 216-17. At common law, however, this right never has been absolute, nor has it extended to all documents filed with the court. The public does not have a presumption of access to documents that do not bear directly on the courts' adjudicatory functions. See *Seattle Times Co.* v. *Rhinehart*, supra, 467 U.S. at 34-35 (rights of those participating in discovery process remain strong, although considerations such as prevention of discovery abuse and protection of legitimate privacy interests may limit exercise of first amendment rights); accord *United States* v. *Amodeo*, supra, 71 F.3d at 1049 ("the weight to be given the presumption of access must be governed by the role of the material at issue in the exercise of ... judicial power [under article three, § 1, of the United States constitution] and the resultant value of such information to those monitoring the federal courts"). Indeed, the 2005 commentary to § 11-20A expressly indicates that certain material is exempted from the presumption of public access, in accordance with, inter alia, the common law. Practice Book (2005) § 11-20A, commentary ("[a]s used in subsection [a] above, the words '[e]xcept as otherwise provided by law' are intended to exempt from the operation of this rule all established procedures for the sealing or ex parte filing, in camera inspection and/or nondisclosure to the public of documents, records and other materials, as required or permitted by statute ... other rules of practice ...*and/or controlling state or federal case law*" [citations omitted; emphasis added]).

In light of this history and the commentary to § 11-20A of the Practice Book, it is clear that this rule was not meant to be read literally. If this court were to interpret the word "filed" literally, Connecticut would apply a broader approach to the presumption of public access than any jurisdiction to have considered this issue. As we explained in part II A of this opinion, even those jurisdictions that state their rule broadly in terms of documents "filed" with the court limit public access to documents connected with the court's adjudicatory function. In light of the absence of any indication to the contrary, the express direction of the commentary and our practice and precedents, we see no reason to adopt such an expansive interpretation. We therefore hold that § 11-20A codifies the common-law presumption of public access to judicial documents only.[29]

Our conclusion that § 11-20A codifies the common-law presumption of public access to judicial documents, however, does not end the inquiry. The question remains what constitutes a judicial document.

For the reasons that follow, we conclude that Connecticut follows the broader approach under which any document filed that a court reasonably may rely on in support of its adjudicatory function is a judicial document. First, by use of the term "filed," the Practice Book indicates that the more expansive approach applies. Second, the majority of jurisdictions, and the clear trend of the common law,

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[29] In light of our conclusion that Practice Book § 11-20A codifies the common law, we reject the defendants' claim that § 11-20A violates the separation of powers by " 'decree[ing]' substantive law of Connecticut via its rule-making process."

regardless of whether the courts limit their definition to only those documents "filed" with the court, is to allow access to any document related to the court's adjudicatory function. See, e.g., *United States* v. *Amodeo*, supra, 44 F.3d at 145; *Leucadia, Inc.* v. *Applied Extrusion Technologies, Inc.*, supra, 998 F.2d at 161-62. Indeed, our statements in *Rosado* were consistent with this approach. See *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, supra, 276 Conn. at 217 n.54 ("[t]he item filed must be relevant to the performance of the judicial function and useful in the judicial process in order for it to be designated a judicial document" [internal quotation marks omitted]). Third, the narrower approach does not advance fully the public's interest in monitoring the judicial process, as it sheds light only on those rulings that directly affect the disposition of a case but shields numerous decisions that incrementally and indirectly may be outcome determinative.

Although we recognize that, among the courts following the majority rule, there is a split as to whether discovery related motions and their associated exhibits should be considered judicial documents, we agree with the Court of Appeals for the District of Columbia that discovery proceedings can have a significant impact on the eventual resolution of disputes. *Mokhiber* v. *Davis*, supra, 537 A.2d at 1112. Because of their impact on the judicial process, the public interest in judicial monitoring extends to such motions. The actions of the court during the pretrial period ultimately shape issues between the parties at trial or settlement, and the public surely has a vested interest in ensuring that those actions are carried out equitably, free from corruption or error. The vindication of this interest supports public access, not only to the proceedings

themselves, but to any materials upon which a court may rely in reaching a decision. Accordingly, we hold that judicial documents are those filed with a court upon which the court reasonably could rely in the performance of its adjudicatory function, including discovery related motions and their associated exhibits.

We recognize that this broad definition of judicial documents creates the potential for parties to harass others by attaching private material with little to no relevance to the issues to underlying motions, thus rendering that material public. But we do not presume bad faith on the part of litigants or their attorneys. See Rules of Professional Conduct 3.1 through 3.6. There are many reasons why a party may introduce material into the court record, not the least of which is the party's responsibility to provide an adequate record for appeal. Practice Book § 61-10[30]; *Schoonmaker* v. *Lawrence Brunoli, Inc.*, 265 Conn. 210, 232, 828 A.2d 64 (2003). Instead, we note that there are other avenues open to litigants and courts to control the introduction of material that may be improper, and we encourage those avenues to be taken when appropriate.[31]

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[30] Practice Book § 61-10 provides in relevant part: "It is the responsibility of the appellant to provide an adequate record for review.... For purposes of this section, the term 'record' ... includes all trial court decisions, documents and exhibits necessary and appropriate for appellate review of any claimed impropriety."

[31] This potential problem can be avoided in large part, if not entirely, by the parties entering into a confidentiality agreement and protective order providing that certain documents will be produced to the opposing party on the understanding that they will only be submitted to a court by

It is also within the authority of the trial court, if it believes it necessary to limit the introduction of certain material, to issue orders to that effect by virtue of both its statutory authority pursuant to General Statutes § 51-14(a) and its inherent supervisory authority, to "bring about an orderly, expeditious, and just determination of the issues." *In re Appeal of Dattilo*, 136 Conn. 488, 493, 72 A.2d 50 (1950). If those orders are contravened, or if it can be shown that information is included in bad faith, parties or the trial court may seek sanctions. *Stanley v. Hartford*, 140 Conn. 643, 648, 103 A.2d 147 (1954) ("the court has inherent power to provide for the imposition of reasonable sanctions to compel the observance of its rules").

C

With these principles in mind, we turn to the trial court's decision in the present case. As we previously have noted, the trial court held, pursuant to Practice Book § 11-20A, that the presumption of public access applies to any document "filed with the court...." (Internal quotation marks omitted.) The trial court rejected the defendants' contention that in *Rosado*, this court had determined that the presumption of public access applies only to judicial documents. It concluded that this court instead had been "referring to the common law and constitutional

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way of the lodging process set forth in Practice Book § 7-4C. As set forth, in § 7-4C, a "lodged" record is not considered filed with the court and, therefore, would not be considered a judicial document until such time as the judicial authority grants the motion to seal the record and it is placed in the court file. In the alternative, if the court does not grant the motion to seal, the lodged documents will be returned to the party and, therefore, not be considered a judicial document.

rights of public access," which the trial court viewed as distinct from the presumption of public access set forth in the rules of practice. The trial court therefore found no need to engage in a review of the judicial document logs that the defendants had submitted, in which they had designated each sealed document in the court file as either a judicial or nonjudicial document and the basis for that characterization.[32]

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[32] The judicial documents logs itemized each sealed document and provided the following information: whether the document is a pleading and a description of that document in support of that characterization, the date the document was filed, the Bates number for the document, the docket entry number, if applicable, and the reasons why, in the defendants' view, the document is or is not a judicial document. For example, one entry provided as follows:

"PLEADING:	This document is not a pleading. Rather it is a letter pertaining to the [defendants'] motion to obtain oral argument on the plaintiff's objection to the [defendants'] request to revise the complaint dated April 21, 1993.
DATE:	June 15, 1993
BATES NUMBERS:	001792-001793
DOCKET ENTRY NO.:	N/A
JUDICIAL DOCUMENT	

In light of our discussion of the Practice Book's codification of the common law, it is clear that the trial court improperly concluded that the presumption of public access applied to all documents "filed" with the court. Therefore, it was incumbent upon the trial court to determine first whether the documents in question were judicial documents before concluding that a presumption of public access applied to them.

On appeal, the defendants claim that only documents submitted in connection with dispositive motions on the merits of the case should be considered judicial documents. Even more specifically, they contend that only motions that, when granted, result in an adjudication on the merits are judicial documents. Therefore, in the defendants' view, in accordance with their judicial document logs, summary judgment motions (and their attached exhibits) that were granted are judicial documents, whereas, for example, summary judgment motions (and their attached exhibits) as well as nondispositive pleadings, such as motions in limine or sealed discovery motions, that were denied are not judicial documents.

STATUS: This document is not a judicial document because it is merely a letter to the plaintiff's attorney with a copy sent to the court. This letter is not a dispositive motion on the merits of the case." *Rosado v. Bridgeport Roman Catholic Diocesan Corp.*, Docket No. CV-93-0157085-S, The Bridgeport Roman Catholic Diocesan Corporation's and Related Defendants' Judicial Documents Log (May 16, 2006) pp. 11-12.

The intervenors respond that, even if the presumption of public access applies only to judicial documents, the documents in question are judicial documents because they were submitted to the court in connection with a pending matter. Specifically, they claim that any motions and their attached exhibits that have been submitted to the court are judicial documents, including, for example, summary judgment motions, whether granted or denied, motions in limine or motions in connection with discovery. Therefore, the intervenors disagree with the defendants' definition of judicial documents.

Our review of the file has not given us any basis to question the defendants' characterization of the documents within the document logs. Accordingly, we are left with a very lengthy document log to which we properly may apply the legal definition set forth in this opinion because, as we have already stated, the question of what constitutes a judicial document is a question of law, and therefore, our review is plenary. See *PNC Bank, N.A.* v. *Kelepecz*, 289 Conn. 692, 697, 960 A.2d 563 (2008) (application of statute to undisputed facts requires plenary review); *Copas* v. *Commissioner of Correction*, 234 Conn. 139, 152-53, 662 A.2d 718 (1995) (noting that application of law to facts subject to plenary review when facts not in dispute). Accordingly, this court may determine as a matter of law whether the documents are judicial documents.

We have reviewed the logs submitted by the defendants and, applying the standard discussed in part II B of this opinion, it is evident that all of the documents, except for a handful of items, are judicial documents. As we previously have explained, any document filed with the court upon which it

reasonably could rely in performing its adjudicatory function is a judicial document subject to the presumption of public access. Therefore, all of the nondispositive motions filed in the present case, such as motions in limine or sealed discovery motions and their attached exhibits, along with all of the dispositive motions filed in the present case, such as summary judgment motions and their attached exhibits, *regardless of whether they were granted or denied*, are judicial documents. Accordingly, we agree with the trial court, albeit applying slightly different reasoning, that the presumption of public access applies to these documents.

Our review of the logs reveals, however, a small number of documents, fifteen to be precise, that were not marked in support of any motion or other determination of the court and, therefore, could not have been relied upon in the course of adjudicatory action. For example, the judicial documents logs list two deposition transcripts that were not filed in connection with any motion. Such documents clearly are not judicial documents. See *Leucadia, Inc.* v. *Applied Extrusion Technologies, Inc.*, supra, 998 F.2d at 163-64; *Rufer* v. *Abbott Laboratories*, supra, 154 Wash.2d at 541, 550-51. We conclude that as a matter of law, these fifteen documents are not judicial documents.[33] Accordingly, these documents

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[33] Specifically, we conclude that the following documents, referenced by Bates number, are not judicial documents: (1) the letter from Joseph T. Sweeney to Attorney Douglas P. Mahoney, dated April 28, 1993, Bates No. 001776; (2) the letter from Joseph T. Sweeney to Attorney Cindy L. Robinson, dated June 15, 1993, Bates Nos. 001792 through 001793; (3) the letter from Frank W. Murphy to Donald J. Mastrony, dated February 3, 1995, Bates Nos. 001778 through 001779; (4) the letter from T.

are not subject to a presumption of public access, and the trial court's order must be reversed to the extent that it unseals these documents. We note, however,

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Paul Tremont to Hon. Bruce Levin, dated March 3, 1995, Bates No. 001777; (5) the bill from the court reporter for transcript of the hearing dated July 15, 1996, with the attached transcript, Bates Nos. 001786 (letter) and 001787 through 001789 (transcript); (6) the newspaper article dated August 9, 1996, Bates No. 001794; (7) the letter from Douglas P. Mahoney to Hon. David W. Skolnick, dated August 11, 1998, Bates Nos. 002161 through 002162; (8) volume two of the deposition transcript of Reverend Monsignor William Genuario, dated March 13, 1997, with associated exhibits, not attached to any particular motion, Bates Nos. 005596 through 005805 and 002372 through 002581; (9) volume two of the deposition transcript of Reverend Monsignor William Genuario, dated March 13, 1997, with associated exhibits, not attached to any particular motion, Bates Nos. 005806 through 006015; (10) the defendants' response to the supplemental interrogatories, dated April 16, 1997, Bates Nos. 009440 through 009455; (11) internal court memorandum from Hon. Bruce Levin to Donald J. Mastrony, chief clerk, dated January 8, 1997, Bates No. 006934; (12) the notes by Hon. Bruce Levin from two motions, dated January 8, 1997, Bates No. 006935; (13) the excerpts from the transcript of deposition of Charles Carr, dated October 5, 1995, not submitted in support of any motion, Bates Nos. 009586 through 009689; (14) the deposition transcript of Bishop Walter Curtis, dated July 31, 1995, not attached to any particular motion, Bates Nos. 002008 through 002096; and (15) internal court memorandum from Hon. Bruce Levin to Donald J. Mastrony, chief clerk, dated January 8, 1997, Bates No. 009312. We note that only these particular documents, as referenced by a Bates number, do not meet the definition of judicial document. To the extent that copies of these documents may exist in the court file and have been marked in support of motions or otherwise indicate that they support particular adjudicatory action; see, e.g., the deposition transcript of Bishop Walter Curtis; the designation of these particular documents as nonjudicial documents does not strip any other copies of their status as judicial documents.

that the trial court's order denying the motion to vacate the sealing order remains intact to the extent that it addresses documents not challenged in this appeal. See footnote 26 of this opinion. Pursuant to the trial court's order, those documents remain under seal.

D

The defendants cite two reasons why, even if the documents are judicial documents, the presumption of public access does not apply. They claim that the trial court improperly failed to engage in the balancing test followed by the Court of Appeals for the Second Circuit in which privacy interests and other countervailing factors are weighed against the presumption of public access.[34] The defendants cite no controlling authority nor do they offer any persuasive rationale why this test should either be engrafted onto our rules of practice or supersede those rules as defined in the Practice Book. It is axiomatic that courts in Connecticut adjudicating matters of state law are not bound by a test that a federal court must apply. In Connecticut, the rules of practice and procedure are defined in our Practice

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[34] In *United States* v. *Amodeo*, supra, 71 F.3d at 1044, the Second Circuit set forth standards to be employed when considering whether a judicial document should be sealed from public view. First, the court must determine the weight of the presumption of public access by evaluating the item's role in the judicial process. *Id.*, at 1049. Next, the court must balance countervailing considerations, including privacy interests, against that presumption before determining that the item should be unsealed. *Id.*, at 1050.

Book and controlling case law. Accordingly, we reject this claim.[35]

Moreover, Practice Book § 11-20A sets forth procedures to be followed when determining whether documents should be placed under seal, and under that section, the trial court is directed explicitly to engage in a balancing test under which a sealing order may be entered only if "necessary to preserve an interest which is determined to override the public's interest in viewing such materials." Practice Book § 11-20A (c).

With respect to the defendants' claim that any presumption of public access was terminated by operation of Practice Book §§ 7-10 and 7-21; see footnote 21 of this opinion; after one year had passed from the date of the withdrawal of the underlying cases, we are not persuaded. Section 7-10 permits, but does not mandate, the destruction of files in the court's possession one year after a case has been withdrawn. See Practice Book §§ 7-10 and 7-11 (documents may "be destroyed"); *State* v. *Bletsch*, 281 Conn. 5, 17, 912 A.2d 992 (2007) ("the word may imports permissive conduct" [internal quotation marks omitted]). Section 7-21 expressly imposes a duty on parties to remove any exhibits, briefs,

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[35] We note that the defendants' claim implicates the question of whether a document that is determined to be "judicial" may be sealed. The issue in the present case, however, concerns whether previously sealed documents should be unsealed, and thus, the Second Circuit's balancing test to determine whether judicial documents should be sealed; see footnote 34 of this opinion; is inapposite. When considering whether a sealing order should be modified to unseal previously sealed documents, the court must engage in the test that we set forth in part IV of this opinion.

depositions, and memoranda from the court file after the final determination of the case. It is well established that courts possess supervisory authority over documents in their possession. *Nixon* v. *Warner Communications, Inc.*, supra, 435 U.S. at 598; *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, supra, 276 Conn. at 216. While in the court's possession, judicial documents remain part of the court's records and are subject to the presumption of public access pursuant to Practice Book § 11-20A (a). Parties electing to leave documents in the custody of the court after the time when they are authorized to remove them do so at their peril.

The defendants cite *Littlejohn* v. *BIC Corp.*, 851 F.2d 673, 683 (3d Cir. 1988), for the proposition that files that are subject to destruction are not judicial records within the supervisory power of the court. The defendants misconstrue *Littlejohn*, which actually holds that, "absent allegations of fraud or other extraordinary circumstances, trial *exhibits that were restored to their owner* after a case has been completely terminated and which were properly subject to destruction by the clerk of [the] court are no longer judicial records within the supervisory power of the [D]istrict [C]ourt." (Emphasis added; internal quotation marks omitted.) *Id.* In the present case, the documents remained in the court's possession after being subject to destruction. The documents, therefore, continued to be court records subject to the supervisory authority of the court, and the presumption of public access was not terminated.

III

The defendants' third claim is that the trial court improperly granted the intervenor's motion to vacate because the documents were subject to various

statutory and constitutional[36] privileges, including the clergyman's privilege, as set forth in General Statutes § 52-146b,[37] and religious privileges provided under the first amendment to the United States constitution. They also claim that, despite the fact that they divulged the documents in question to the plaintiffs in the course of discovery without asserting any privileges at that time, the trial court improperly concluded that they had waived those privileges because they had produced the documents under the protection of a sealing order. The defendants further claim that any disclosure to the plaintiffs was a selective waiver at best. We disagree.

The first amendment to the United States constitution provides in relevant part: "Congress

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[36] In their brief, the defendants briefly mention the state constitution as one basis for their privilege claims. They do not, however, provide any independent analysis of the state constitutional claim, as required under *State* v. *Geisler*, 222 Conn. 672, 684-85, 610 A.2d 1225 (1992). "We have repeatedly apprised litigants that we will not entertain a state constitutional claim unless the defendant has provided an independent analysis under the particular provisions of the state constitution at issue.... Without a separately briefed and analyzed state constitutional claim, we deem abandoned the defendant's claim." (Internal quotation marks omitted.) *State* v. *Randolph*, 284 Conn. 328, 375 n.12, 933 A.2d 1158 (2007). Therefore, we limit our review to the federal constitution.

[37] General Statutes § 52-146b provides: "A clergyman, priest, minister, rabbi or practitioner of any religious denomination accredited by the religious body to which he belongs who is settled in the work of the ministry shall not disclose confidential communications made to him in his professional capacity in any civil or criminal case or proceedings preliminary thereto, or in any legislative or administrative proceeding, unless the person making the confidential communication waives such privilege herein provided."

shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...." Because we conclude that the trial court properly determined that the defendants waived all privileges other than those addressed in footnote 9 of this opinion, we express no opinion as to whether the first amendment affords any such religious privileges.

The record reveals the following additional undisputed facts and procedural history. After the sealing order had entered, the defendants disclosed numerous documents to the plaintiffs in the course of discovery, some of which were filed later in court. In its memorandum of decision granting in part the motion to vacate the sealing orders, the trial court analyzed the defendants' claim that most of the documents were protected by various privileges. See footnote 9 of this opinion. The trial court found that it was undisputed that, when the defendants disclosed the documents in discovery, they had not objected to such disclosure and did not assert, inter alia, the clergyman's or other statutorily or constitutionally protected religious privileges. Because the defendants had failed to assert the privileges at the time of disclosure, the trial court concluded that any privileges that might have applied had been waived.

The trial court also rejected the defendants' claim that any waiver that they arguably might have given to the plaintiffs was selective, i.e., to the plaintiffs alone, not to the public generally. It noted that the defendants had not expressly limited their disclosure to the plaintiffs. Thus, as a factual matter, any confidentiality that may have been provided by the privileges was vitiated when the information was disclosed. The trial court rejected as a matter of law

the applicability of the doctrine of selective waiver, reasoning that the doctrine is not favored because it would inhibit the truth seeking process and would allow parties to manipulate the judicial process by invoking privileges to protect material that already had been disclosed. Accordingly, the trial court concluded that no privileges protected the documents in question.

As a preliminary matter, we note that, although the question of whether a privilege has been waived ordinarily presents a question of fact reviewed under a clearly erroneous standard, the standard of review is plenary when the trial court has made its determination on the basis of pleadings and other documents, rather than on live testimony. *C.R. Klewin Northeast, LLC* v. *Bridgeport*, 282 Conn. 54, 86-87, 919 A.2d 1002 (2007). In the present case, the factual circumstances are undisputed, and the trial court made its determination on the basis of pleadings or other documents. Therefore, our review is plenary.

Waiver is the "intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L.Ed. 1461 (1938); *C.R. Klewin Northeast, LLC* v. *Bridgeport*, supra, 282 Conn. at 86. As a general rule, both statutory and constitutional rights and privileges may be waived. *New Haven* v. *Local 884, Council 4, AFSCME, AFL-CIO*, 237 Conn. 378, 385, 677 A.2d 1350 (1996). "Waiver is based upon a species of the principle of estoppel and where applicable it will be enforced as the estoppel would be enforced.... Estoppel has its roots in equity and stems from the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity,

from asserting rights which might perhaps have otherwise existed.... Waiver does not have to be express, but may consist of acts or conduct from which waiver may be implied.... In other words, waiver may be inferred from the circumstances if it is reasonable to do so." (Internal quotation marks omitted.) *C.R. Klewin Northeast, LLC* v. *Bridgeport*, supra, at 87.

The conduct of the parties may be used to establish waiver. *New Haven* v. *Local 884, Council 4, AFSCME, AFL-CIO*, supra, 237 Conn. at 388. It is well established that a party that fails to object timely to the introduction of evidence or fails to assert a privilege in connection with disclosed material is deemed to have waived such objection or privilege and may not subsequently resurrect it to protect that material from subsequent disclosure. See *Waterman* v. *United Caribbean, Inc.*, 215 Conn. 688, 692, 577 A.2d 1047 (1990) (party that fails to object timely waives statutory rights to time limits on judgment); *State* v. *Saia*, 172 Conn. 37, 44, 372 A.2d 144 (1976) (party failing to claim marital privilege during testimony may not subsequently assert privilege to prevent its introduction into evidence); *O'Brien* v. *Superior Court*, 105 Conn.App. 774, 787, 939 A.2d 1223 (2008) ("[I]f the holder of the privilege fails to claim his privilege by objecting to disclosure by himself or another witness when he has an opportunity to do so, he waives his privilege as to communications so disclosed.... This result is reached because once the confidence protected has been breached, the privilege has no valid continuing office to perform." [Citation omitted; internal quotation marks omitted.]). Similarly, the voluntary disclosure of confidential or privileged material to a third party, such as an adversary, generally constitutes a waiver

of privileges with respect to that material. *Westinghouse Electric Corp.* v. *Philippines*, 951 F.2d 1414, 1418 (3d Cir. 1991) ("by disclosing documents to the [Securities and Exchange Commission] and to the [Department of Justice], [the plaintiff] waived both the attorney-client privilege and the work-product doctrine with respect to those documents"). When the disclosure is inadvertent, however, some courts have held that privileges may not have been waived. *Harp* v. *King*, 266 Conn. 747, 767, 835 A.2d 953 (2003) (citing different approaches courts have taken to inadvertent disclosure with respect to waiver of attorney-client privilege).

In the present case, it is undisputed that the defendants failed to assert privileges at the time that they disclosed the documents to the plaintiffs.[38] It is also undisputed that the information was produced by the defendants during discovery, either through deposition testimony or documents delivered to the plaintiffs. Because the defendants failed to claim these privileges or rights at the time of disclosure and because the defendants voluntarily disclosed the information to its adversaries in litigation, the

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[38] In their brief to this court, the defendants do not claim that the trial court's finding that they did not assert the privileges when they produced the documents was clearly erroneous. We note, however, that in a footnote in their brief, they have asserted that, in their motion for a protective order to bar forced disclosure of confidential information and supporting memorandum of law dated September 14, 1994, they had claimed that the documents were protected by various privileges, including a statutory employment personnel record privilege, a statutory clergyman's privilege and religious privileges under the first amendment.

defendants cannot now be heard to complain that the information should not be disclosed to others.

To the extent that the defendants intend to suggest by this cursory reference that the trial court improperly found that they had not raised claims of privilege at the time that they disclosed the documents, that claim fails for several reasons. First, it is inadequately briefed. See *Taylor* v. *Mucci*, 288 Conn. 379, 392 n.4, 952 A.2d 776 (2008) (declining to review inadequately briefed claim in which appellant had cited only one case and provided only cursory analysis). Second, when explicitly queried by Judge Alander at the hearing on the intervenors' motion to vacate the sealing order and the defendants' motion to impose a new protective order as to whether privileges had been claimed during discovery but material was ordered produced notwithstanding, the defendants stated that they could not answer. Moreover, when the trial court, Levin, J., entered the sealing orders in 1994, the court's memorandum of decision addressed only the employment personnel record privilege. If the defendants had intended to pursue claims of privilege that were not addressed by the trial court, it was their responsibility to move for an articulation to clarify the basis of the trial court's ruling or to ask for a ruling on any overlooked matter. *Grimm* v. *Grimm*, 276 Conn. 377, 388, 886 A.2d 391 (2005), cert. denied, 547 U.S. 1148, 126 S. Ct. 2296, 164 L. Ed. 2d 815 (2006). Therefore, any claim that the defendants had raised privileges in the trial court would be deemed abandoned. *Samperi* v. *Inland Wetlands Agency*, 226 Conn. 579, 586 n.9, 628 A.2d 1286 (1993).

To the extent the defendants claim that they did not waive the privileges because they disclosed

information with the understanding that it would be sealed, they cite no authority, nor have we uncovered any, to support that proposition. See *Westinghouse Electric Corp.* v. *Philippines*, supra, 951 F.2d at 1418 (holding that privileged documents disclosed to third party with understanding they would remain confidential waived privilege with respect to others). It is well established that it is the party's obligation to make timely objections, and the failure to do so will operate to waive those objections. See *State* v. *Saia*, supra, 172 Conn. at 44 (party that fails to claim marital privilege during testimony may not subsequently assert privilege to prevent its introduction into evidence).

Furthermore, we reject the defendants' contention that any waiver of privileges operated selectively, allowing the defendants to maintain the privilege with respect to parties other than those to whom disclosure was made. We agree with the trial court's conclusion to the contrary and approve of the reasoning employed by the Court of Appeals for the District of Columbia in rejecting the selective waiver doctrine: "[T]he [party] cannot be permitted to pick and choose among [its] opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others, or to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit." *Permian Corp.* v. *United States*, 665 F.2d 1214, 1221 (D.C.Cir. 1981). Indeed, even if we were inclined to adopt this doctrine, we would not do so under circumstances wherein the party had not made such a selective waiver expressly. In the present case, the defendants disclosed material relevant to the underlying cases and ultimately settled those actions. The defendants made no claim of privilege at

the time of disclosure, and they cannot now attempt to use the court to protect material that they failed to safeguard on their own. Accordingly, we conclude that the trial court properly determined that the privileges challenged in this court had been waived.[39]

IV

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[39] To the extent that the defendants claim that the trial court acted improperly by concluding that the clergyman's privilege under § 52-146b had been waived because the privilege belonged to individuals other than the defendants who had not expressly waived their privilege, we disagree. It is well established that we give great deference to a trial court's factual findings, and we will not overturn such findings unless they are clearly erroneous such that they find no evidentiary support in the record. *State* v. *Lawrence*, 282 Conn. 141, 154-55, 920 A.2d 236 (2007). As we already have established, it was undisputed that no privileges had been asserted at the time that the information was disclosed. See footnote 38 of this opinion. The trial court therefore reasonably concluded that the clergyman's privilege had been waived by any defendant to whom the privilege applied on the basis of that failure. To the extent that the defendants claim that individuals other than the defendants were entitled to assert the clergyman's privilege and did not waive it, it was incumbent upon the defendants to establish a foundation to support that claim, including the identity of the purported holder of the privilege, as well as the defendants' standing to make any such assertion. See *State* v. *Rizzo*, 266 Conn. 171, 283, 833 A.2d 363 (2003) (noting that it is defendant's burden to establish foundation to claim privilege and declining to review claim when no foundation had been established). Our review of the record indicates that, both in this court and in the trial court, the defendants made sweeping claims that the clergyman's privilege had not been waived by individual penitents, yet provided no specific support for those claims. There is no evidence in the record that the defendants established any foundation to claim either that such individuals existed or the defendants' standing to assert the privilege.

Finally, we turn to the question of whether the trial court adopted the proper legal standard for determining whether sealing orders should be modified. In accordance with the standard it adopted, the trial court concluded that the sealing orders should be vacated because: (1) the intervenors had met their burden of proving that the initial grounds for the sealing orders no longer existed; and (2) the defendants' countervailing interests, namely, reliance on the sealing orders and pending or potential actions, did not outweigh the public's interest in access to the documents.

On appeal, the defendants claim that: (1) the trial court should have applied the standard adopted by the Court of Appeals for the Second Circuit and some other jurisdictions under which the moving party must establish that "extraordinary circumstances" exist to justify vacating the sealing orders; and (2) the intervenors failed to meet that standard. In the alternative, the defendants contend that this court should adopt the standard for vacating or modifying injunctions and place the burden on the moving party to establish that conditions have changed sufficiently to warrant relief.

In response, the intervenors claim that the trial court applied the proper legal standard because the extraordinary circumstances standard is inapplicable to documents presumptively accessible to the public or to sealing orders unreasonably relied upon. Because we agree that the trial court properly determined the legal standard under which to decide a motion to vacate a protective order, we do not reach the defendants' alternative standard.

We note at the outset that the determination of the appropriate legal standard to apply in deciding a motion to vacate a protective or sealing order is a question of first impression in this state. Our review, therefore, is plenary. *Deschenes* v. *Transco, Inc.*, 288 Conn. 303, 313-14, 953 A.2d 13 (2008); see also *Location Realty, Inc.* v. *Colaccino*, 287 Conn. 706, 717, 949 A.2d 1189 (2008) ("[t]o the extent that we are required to review conclusions of law ... by the trial court, we engage in plenary review"); *Hartford Courant Co.* v. *Freedom of Information Commission*, 261 Conn. 86, 96-97, 801 A.2d 759 (2002) (noting that plenary review required when determining whether correct legal standard applied).

Courts have adopted various standards to determine whether to vacate or modify a sealing order. The extraordinary circumstances test advocated by the defendants and the dissent is the strictest of these standards and requires that, when a party reasonably has relied on a sealing order, it may not be modified "absent a showing of improvidence in the grant of [the sealing] order or some extraordinary circumstance or compelling need...." *Martindell* v. *International Telephone & Telegraph Corp.*, 594 F.2d 291, 296 (2d Cir. 1979); accord *Phillips* v. *General Motors Corp.*, 289 F.3d 1117, 1124 (9th Cir. 2002); *State* v. *Manners*, 239 S. W.3d 583, 587-88 (Mo. 2007). This test effectively establishes a presumption that information that properly has been sealed should remain sealed, particularly when a party has relied upon the sealing order. *Phillips* v. *General Motors Corp.*, supra, at 1124 (holding that when sealing order properly is entered, presumption of access shifts, and party seeking access must demonstrate why access is necessary). Reliance must be reasonable, however,

and is not justified for sealing orders that are temporary or limited by their terms. *Securities & Exchange Commission* v. *TheStreet.com*, 273 F.3d 222, 230-31 (2d Cir. 2001).

Other courts that have considered this question, however, have rejected the extraordinary circumstances test in favor of a less stringent, balancing of the interests test. See, e.g., *Pansy* v. *Stroudsburg*, supra, 23 F.3d at 790; *Mokhiber* v. *Davis*, supra, 537 A.2d at 1116-17; see also *Beckman Industries, Inc.* v. *International Ins. Co.*, 966 F.2d 470, 475-76 (9th Cir. 1992); *United Nuclear Corp.* v. *Cranford Ins. Co.*, 905 F.2d 1424, 1428 (10th Cir. 1990); *Public Citizen* v. *Liggett Group, Inc.*, 858 F.2d 775, 790-92 (1st Cir. 1988); *Wilk* v. *American Medical Assn.*, 635 F.2d 1295, 1299-1301 (7th Cir. 1980).[40] Under this approach, the moving party bears the burden of demonstrating why modification is

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[40] Many courts that have rejected the extraordinary circumstances test have done so in the context of disputes whereby a litigant seeks information that already has been disclosed in other legal proceedings. These courts have balanced the interests in favor of disclosure, specifically finding that modification is appropriate to avoid duplicative discovery requests and citing judicial economy as a reason to modify protective orders. *Beckman Industries, Inc.* v. *International Ins. Co.*, supra, 966 F.2d at 475-76; *United Nuclear Corp.* v. *Cranford Ins. Co.*, supra, 905 F.2d at 1428; *Public Citizen* v. *Liggett Group, Inc.*, supra, 858 F.2d at 790-92; *Wilk* v. *American Medical Assn.*, supra, 635 F.2d at 1299-1301. Under this approach, unless the party wishing to keep the documents sealed would be prejudiced, the sealing order may be modified at the discretion of the court. *Beckman Industries, Inc.* v. *International Ins. Co.*, supra, at 475-76; *United Nuclear Corp.* v. *Cranford Ins. Co.*, supra, at 1428; *Wilk* v. *American Medical Assn.*, supra, at 1299.

appropriate, and, upon such a showing, the court balances the interests of the party moving to unseal the information with the countervailing interests presented by the party seeking to keep the information sealed. See, e.g., *Pansy* v. *Stroudsburg*, supra, at 790 ("The party seeking to modify the order of confidentiality must come forward with a reason to modify the order. Once that is done, the court should then balance the interests, including the reliance by the original parties to the order, to determine whether good cause still exists for the order."); *Mokhiber* v. *Davis*, supra, at 1117 (requiring party seeking modification to show why sealing is not justified, then permitting opposing party to demonstrate countervailing interest to keep information sealed, and finally requiring moving party to show that countervailing interest does not outweigh public interest in disclosure). Courts applying this standard have viewed it as more compatible with a presumption of public access than the extraordinary circumstances test because, once the moving party has demonstrated sufficient reason to modify the order, the presumption of public access is reasserted as to the documents, favoring disclosure over sealing. *Mokhiber* v. *Davis*, supra, at 1117.

We agree with the trial court that the test for modifying the sealing orders advocated by the defendants, the extraordinary circumstances test, is not the proper legal standard. Indeed, in *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, supra, 276 Conn. at 216-17, we explained why such a stringent standard should not be applied and suggested that a balancing test would be more consistent with our rules of practice. In addressing an argument raised by the dissent in that case, we stated: "[A] party's reasonable reliance on the

continued vitality of a protective order is a factor that a court must weigh in deciding whether, under the particular facts and circumstances of the case, to vacate or to modify that order. But the dissent goes much farther, elevating that reliance to an exalted status that almost always will be outcome determinative in favor of the party seeking to block public access to court documents. Indeed, under the dissent's unprecedented view, the public will not even be afforded party status in its effort to obtain documents in the court's possession unless it first can establish an 'extraordinary circumstance' or a 'compelling need' for the sealed materials. In requiring the public to establish a compelling need to overcome the parties' asserted interest in maintaining the secrecy of documents in the court's possession, the dissent improperly skews the analysis and bucks the strong consensus favoring disclosure of such documents in the absence of a need for continued secrecy." *Id.*, at 210-11. Moreover, the standard advocated by the defendants would be inapplicable to the circumstances presented in the present case, as the trial court properly concluded that the defendants' reliance on the sealing orders remaining permanent was not reasonable given that the orders expressly stated that they would be reconsidered no later than at the time of jury selection.

We conclude that the legal standard employed by the trial court to modify the sealing orders was proper. Under this standard, the moving party bears the burden of demonstrating that appropriate grounds exist for modifying sealing orders. These grounds include: the original basis for the sealing orders no longer exists; the sealing orders were granted improvidently; or the interests protected by

sealing the information no longer outweigh the public's right to access. This latter ground permits the trial court to consider situations in which the original basis for the sealing orders still exists to some degree but has been altered because of a change in circumstances. Once the moving party has met its burden, the court must balance the countervailing interests, if any, introduced by the party favoring continuation of the sealing orders against the public's interest in access to judicial documents. As we acknowledged in *Rosado*, the countervailing interests include, but are not limited to, any reasonable reliance by the parties on the sealing orders and the countervailing privacy interests. *Id.*; see also *Beckman Industries, Inc.* v. *International Ins. Co.*, supra, 966 F.2d at 475. In sum, the trial court properly concluded, at least with respect to the vast majority of the documents, that the sealing orders should be vacated.

The judgments are reversed in part and the case is remanded with direction to order that the fifteen documents enumerated in footnote 33 of this opinion shall remain sealed; the judgments are affirmed in all other respects.

In this opinion ROGERS, Chief Justice, and PALMER and VERTEFEUILLE, Justices, concurred

SULLIVAN, Justice, dissenting.

I disagree with both the majority's conclusion that the trial judge did not abuse his discretion in denying the defendants'[1] motion requesting that he

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[1] The defendants are identified in footnote 1 of the majority opinion.

recuse himself and with its conclusion that the trial court properly granted the intervenors'[2] motions to vacate the sealing orders. Accordingly, I dissent.

I

I first address the defendants' claim that the Honorable Jon M. Alander improperly denied their request that he recuse himself because his dual roles as a member of the judicial branch's public access task force (task force) and as the presiding judge in this case resulted in an actual or apparent conflict. The following facts are relevant to this claim. On May 9, 2006, the judicial branch issued a press release in which it announced that Senior Associate Justice David M. Borden, who was the acting head of the judicial branch, had created the task force, the mission of which was to "make recommendations for the maximum degree of public access to the courts, consistent with the needs of the courts in discharging their core functions...." (Internal quotation marks omitted.) Press Release, Connecticut Judicial Branch, Judicial Branch's Public Access Task Force Schedules May 25 Meeting (May 9, 2006). The task force was comprised of Associate Justice Richard N. Palmer, the chairman, eight additional members of the judiciary, seven members of the news media, including Alaine Griffin, a reporter with the Hartford Courant, and two attorneys.

At the June 26, 2006 annual meeting of the judges of the Superior Court, Justice Borden explained the reasons for the creation of the task force. Remarks of Senior Associate Justice David M.

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[2] The intervenors are identified in footnote 2 of the majority opinion.

Borden, Annual Judges Meeting (June 26, 2006) pp. 2-3. He noted that Governor M. Jodi Rell recently had appointed her own task force to recommend ways to make the judicial system more open. *Id.*, at p. 4. He stated that, "in the eyes of the other two branches of government, the press, and the public with whom those entities communicate daily, the judicial system is perceived as broken in that it is not sufficiently open and accessible. In that regard, there are things about the judicial system that need fixing. I assure you that if we don't fix it ourselves, others will be only too willing to do that for us." *Id.* He stated that, "[u]nless we, as judges, seize the initiative, our opportunity to affect the ongoing debate will be lost, with serious long-term consequences for the [j]udicial [b]ranch, judicial independence, and ultimately, the public interest." *Id.*

The public concerns over public access to the courts that the task force was intended to address had arisen in part as the result of two recent controversies. First, in June, 2002, the Connecticut Law Tribune published an article revealing that the judicial branch had engaged in a practice of classifying sealed case files as level 1, level 2 and level 3. The level 1 files lacked public docket numbers and party names. The level 2 files were provided with names and docket numbers, but the entire case was sealed. The level 3 files contained individually sealed documents in an otherwise open file. See T. Scheffey, "Settlement Reached In Secret-Files Suit," 32 Conn. L. Trib. No. 25, June 12, 2006,

p. 2; see also *Hartford Courant Co.* v. *Pellegrino*, 380 F.3d 83, 87 (2d Cir. 2004).[3]

This revelation resulted in "extensive coverage" of the sealing practice by various newspapers, which, in the words of a newspaper reporter, "touched off a public outcry...." T. Scheffey, supra, 32 Conn. L. Trib. at No. 25, p. 2. In response, the judicial branch abolished the level 1 file system and the Superior Courts were instructed that, in the future, all cases should have docket numbers. *Id.* These new rules were not retroactive, however, and the Hartford Courant, later joined by the Connecticut Law Tribune, brought an action against the judicial branch in the United States District Court seeking the names, docket numbers and docket sheets of the previously sealed level 1 files and level 2 files. *Id.*; see also *Hartford Courant Co.* v. *Pellegrino*, 290 F. Sup.2d 265 (D.Conn. 2003). The judicial branch argued that the action should be dismissed because, among other reasons, issues involving the scope of public access to court documents currently were being litigated in state court in the present case. See *Hartford Courant Co.* v. *Pellegrino*, supra, 290 F. Sup. at 2d 270 ("[t]he court ... believes that a discussion of the issues in the case of *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, 77 Conn.App. 690, 825 A .2d 153 [certs. granted, 266 Conn. 906, 907, 832 A.2d 71, 72 (2003)] is merited

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[3] I was a named defendant in *Hartford Courant Co.* v. *Pellegrino*, supra, 380 F.3d at 83, in my capacity as Chief Justice of the Supreme Court.

because the case is central to the arguments of both parties in the present litigation").[4]

On June 6, 2006, the newspapers and the judicial branch settled the federal litigation and stipulated to its dismissal. Under the terms of the settlement agreement, the judicial branch agreed to transfer all level 1 cases to a single Superior Court judge who was to have authority to rule on the merits of any and all motions to obtain access to the records.

Second, the task force was intended to address public concerns that had arisen as the result of this court's May 2, 2006 decision in Clerk of the *Superior Court* v. *Freedom of Information Commission*, 278 Conn. 28, 42, 895 A.2d 743 (2006), in which we had concluded that only court records "pertaining to budget, personnel, facilities and physical operations of the courts" were subject to the Freedom of Information Act, and that "records created in the course of carrying out the courts' adjudicatory function are categorically exempt from the provisions of the act." *Id.*, at 29.

On May 17, 2006, the judicial branch announced that two judges who had been appointed to the task force would not be able to serve and that they would be replaced by Judge Alander and Judge Barry K. Stevens. Press Release, Connecticut Judicial Branch, Update on Justice Borden's Public Access Task Force (May 17, 2006). The Hartford Courant reported that the judges had been replaced after they had informed

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[4] The United States Court of Appeals for the Second Circuit ultimately rejected the judicial branch's argument that the resolution of the present case would resolve the issues in the litigation over the sealed files. See *Hartford Courant Co.* v. *Pellegrino*, supra, 380 F.2d at 99-100.

Justice Borden that "they were caught up in the controversy and ongoing legal battle over the 'super-sealing' of court files." L. Tuohy, "Changes In Court Task Force," Hartford Courant, May 17, 2006, p. B1.

Thereafter, Judge Alander was appointed as the cochairman of the task force's court records committee (committee). Griffin, the reporter for the Hartford Courant, was also appointed to that committee. Judge Alander and Griffin attended six committee meetings together over the course of approximately eight weeks. At its June 6, 2006 meeting, the committee adopted four "guiding principles" regarding public access to court documents. The first two principles were: (1) "All records are presumptively open"; and (2) "Records should be closed to the public only if there is a compelling reason to do so." Those principles were incorporated into the committee's final report to Justice Borden. See Connecticut Judicial Branch, Public Access Task Force, Final Report (September 15, 2006), p. 4-10. The final report also defined "[c]ourt [r]ecord" to include: "(1) Any document, information, or other item that is collected, received, or maintained by a court or clerk of [the] court in connection with a judicial proceeding"; and "(2) Any index, calendar, docket, register of actions, official record of the proceedings, order, decree, judgment, minute, and any information in a case management system created by or prepared by the court or clerk of the court that is related to a judicial proceeding...." *Id.*, at p. 4-12.

Not all members of the judicial branch were pleased with the task force proceedings. A judge of the Superior Court gave a speech at the June 26, 2006 annual judges meeting in which he expressed

his concern that the judges had not been consulted about the possible changes in the rules governing public access to court documents; see T. Scheffey, "Judges Feel Left Out Of The Loop," 32 Conn. L. Trib. No. 29, July 3, 2006, p. 1; and complained that the judges had been " 'the least informed regarding proposals that may effectuate the most sweeping changes experienced in the history of the [j]udicial [b]ranch....' " *Id.*, at p. 9. The Connecticut Law Tribune reported that the judge's remarks had "implied a danger that [Justice] Borden, through the task force, would attempt to administratively create rule changes and avoid full [r]ules [c]ommittee of the Superior Court oversight and procedure." *Id.*, at pp. 1, 9. The judge's remarks were greeted with applause by some of the other judges. *Id.*, at p. 9. He ended his speech with the statement, " 'No reprisals, please.' "[5] *Id.* In response, Justice Borden indicated that he was aware that "some judges fear [they would] face 'possible adverse consequences' if they spoke against making courts more open," but insisted that that was not the case. *Id.*

With this background in mind, I turn to the principles governing judicial disqualifications. As the majority points out, "canon 3 of the Code of Judicial Conduct requires a judge to disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned. The reasonableness standard is an objective one. Thus,

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[5] I emphasize that I take no position as to whether the judge's concern about reprisals was well-founded. I refer to these remarks only to show that an ordinary person reasonably could have the perception that some judges *felt* that they were under undue pressure to accept policies that would maximize public access to judicial records.

the question is not only whether the particular judge is, in fact, impartial but whether a reasonable person would question the judge's impartiality on the basis of all the circumstances.... Disqualification is required even when no actual bias has been demonstrated if a judge's impartiality might reasonably be questioned because the *appearance* and the existence of impartiality are both essential elements of a fair exercise of judicial authority.... Indeed, prevention of the *appearance* of impropriety is of vital importance to the judiciary and to the judicial process.... Members of the judiciary should be acutely aware that any action they take, whether on or off the bench, must be measured against exacting standards of scrutiny to the end that public perception of the integrity of the judiciary will be preserved.... There must also be a recognition that any actions undertaken in the public sphere reflect, whether designedly or not, upon the prestige of the judiciary.... Judges must assiduously avoid those contacts which might create even *the appearance* of impropriety." (Citations omitted; emphasis added; internal quotation marks omitted.)

In my view, a person of ordinary experience and intelligence reasonably could have the following perception of the foregoing facts.[6] First, the official and publicly stated position of the judicial branch in the federal litigation over the sealed court files was that that case and the present case involved very similar issues and the resolution of the present case

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[6] Again, I emphasize that I do not state that these perceptions are accurate. I believe only that the facts reasonably could appear in this light to persons of ordinary experience and intelligence.

would shed light on, if not govern, the resolution of the federal case. Thus, the judicial branch regarded the present case as involving the same public concerns and controversies as the federal litigation over the sealed cases. Second, the federal litigation, and the outcry in the press over the sealing of court files that led to and accompanied that litigation, were one reason for the judicial branch's creation of the task force. Third, and most significantly, the express mission of the task force was to maximize public access to court records. Although this maximization of public access was to be limited by the needs of the courts, the task force clearly was expected to increase public access to court records and there could be no doubt that at least some private concerns that previously had been considered valid reasons for sealing court files would no longer be deemed sufficient. Fourth, the judicial branch was concerned that, if it did not take steps to maximize public access to court records on its own, public pressure would compel the legislative branch or the executive branch to take those steps for it. Fifth, it appeared that at least some Superior Court judges felt that they were under pressure by the branch itself to adopt or to accept new rules and policies governing public access to court documents that they might not have adopted in the ordinary course of judicial rule making. Sixth, Judge Alander was the chairman of the very committee that was charged with recommending new rules and policies to maximize public access to court records. Finally, Judge Alander served on that committee with Griffin, who was a reporter for the Hartford Courant, which, in turn, is one of the intervenors in the present case. Griffin presumably was chosen to serve on the committee because of the Hartford Courant's

institutional interest in increasing access to court files. Although Justice Borden exhorted the members of the task force to adopt "the vantage point of the public interest,"[7] the Hartford Courant had no ethical or other obligation to consider or to advocate any interests other than its own. Connecticut Judicial Branch, Public Access Task Force, Remarks of Senior Associate Justice David M. Borden for the Opening Meeting (May 25, 2006) p. 6.

In light of these circumstances, I believe that a person of ordinary intelligence and experience would have reason to question Judge Alander's impartiality in the present case.[8] The issues raised in this case were, in the expressed view of the judicial branch, inextricably intertwined with the issues raised in the federal litigation over the sealed cases, and the task force was created in part to address public concerns over the sealing practice.[9] A judge of the Superior Court publicly expressed his view that, as a result of the task force, the judges might be pressured to

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[7] See part I A of the majority opinion.

[8] Again, I have no reason to believe that Judge Alander was actually biased in the present case. I believe only that these circumstances could give rise to a reasonable perception of bias.

[9] The majority understands me to be saying that "there is a public perception that Judge Alander was involved in the controversy of supersealed cases" and claims that this conclusion is the result of a "faulty syllogism." See footnote 13 of the majority opinion. The syllogism provided by the majority may be faulty, but it is not mine. My point is that the legal issues raised by this case were intertwined with the legal issues in the litigation over the sealed cases, which the task force was intended to address, and, therefore, a reasonable person could have the perception that the policies adopted by the task force could have an affect on this case

accept new policies and procedures regarding public access to court records that they would not have adopted in the normal course of rule making. Judge Alander served as the chairman of the very committee that was charged with making the recommendations for these new policies and procedures, and he served on the committee with a representative of one of the intervenors in the present case. Finally, the creation of the task force and Judge Alander's service on it were simultaneous with the present litigation. Thus, at the same time that Judge Alander and Griffin were charged with identifying new procedures and policies to maximize public access to court records, consistent with the needs of the judicial system, Judge Alander was charged with determining whether the public should have access to the court records at issue in the present case.[10]

Accordingly, a person of ordinary experience and intelligence reasonably could have the perception that Judge Alander might believe that a decision adverse to the intervenors in the present case would expose the task force to the very same public criticism that it was intended to allay, would expose the judicial branch to the same risk of interference from the executive and legislative branches that the task force was intended to prevent, and would expose Judge Alander himself to criticism by all three branches of government. A person of ordinary experience and intelligence also reasonably could

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[10] Indeed, if these circumstances did not give rise to even the appearance of partiality, it is difficult to understand why two Superior Court judges were determined to be unable to serve on the task force because of their involvement in the controversy over the sealed cases.

have the perception that the Hartford Courant had access to Judge Alander for the purpose of persuading him of the merits of its position on the issue of maximizing public access to court documents that the defendants in the present case did not have. In my view, that circumstance, in and of itself, was sufficient grounds for disqualification. Finally, a person of ordinary experience and intelligence reasonably could have the perception that, if the defendants in the present case were to challenge policies and procedures that the task force adopted, Judge Alander effectively would be in the position of reviewing his own recommendations.[11] Cf. *United*

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[11] Contrary to Judge Alander's suggestion that the task force was recommending only " 'what the policy and law *should be* regarding public access to court records,' " while the issues in the present case concerned " 'what is the *existing* law regarding public access and how does it apply to the facts of these cases' "; (emphasis in original) see part I A of the majority opinion; it is far from clear that the policies and procedures adopted by the task force could have no affect on this case. Rather, the policies adopted by the task force would be persuasive authority in pending cases. Cf. *Marone* v. *Waterbury*, 244 Conn. 1, 11 n.10, 707 A.2d 725 (1998) ("[i]mplicit in our decisions that have discussed the retroactive application of judgments is the presumption that retroactivity is limited to pending cases"). Indeed, when the federal litigation over the sealed files was settled in June, 2006, an attorney for one of the plaintiff newspapers in that litigation stated: "I'm tremendously pleased that the new leadership of the [j]udicial [b]ranch has recognized the value of resolving this long-standing federal court action and I have every confidence that the matter will be addressed expeditiously by the Superior Court in the new spirit of openness." (Internal quotation marks omitted.) T. Scheffey, supra, 32 Conn. L. Trib. at No. 25, p. 2. Moreover, the majority acknowledges that "what constitutes a document subject to the presumption of public access is a question of law that is squarely presented to this court for the first time." If the task

States v. *Glick*, 946 F.2d 335, 336 (4th Cir. 1991) (judges who were involved in promulgation of sentencing guidelines properly may participate in appeals in "*typical* [g]uidelines cases, unless they involve a serious legal challenge to the [g]uidelines themselves" [emphasis in original; internal quotation marks omitted]). Because I believe that Judge Alander's dual roles as a member of the task force and as the judge in the present case were in apparent conflict, I would conclude that he improperly denied the defendants' request that he recuse himself.

I note that, at the June 13, 2006 meeting of the committee, which both Judge Alander and Griffin attended, there was a discussion of what constitutes a court record subject to public access. Judge Alander "mentioned a [United States Court of Appeals for the Second Circuit] ruling that indicated [that] there is no right of public access to a document filed with the court if the document is not used for adjudication. He indicated that it would be better to keep the rule as broad as possible and handle problems (i.e., filing of scandalous or irrelevant material) by other means so that anything filed with the court is open to public access, whether used for decision-making or not." This is the same standard that Judge Alander ultimately applied in the present case.

In support of its conclusion to the contrary, the majority states that "service on a commission concerned with improving the legal system and the administration of justice, without more, is not a basis for disqualification, even if the subject matter

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force was not intended to formulate official judicial policy on this question, it is difficult to understand what its purpose could have been.

generally relates to the area of the law at issue in the case at hand." As the majority also recognizes, however, "[a]n inquiry into the disqualification of a judge requires a *sensitive* evaluation of *all* the facts and circumstances in order to determine whether a failure to disqualify the judge was an abuse of sound judicial discretion." (Emphasis added.) None of the cases cited by the majority in support of its conclusion involved a situation where: (1) the case under review was inextricably intertwined with a set of events that the commission was intended to address; (2) the commission was charged with formulating the precise policies and procedures that could be dispositive of the case under review and was under political pressure to adopt policies that would be unfavorable to one of the parties; (3) the judge served on the commission with a representative of one of the parties to the case under review; and (4) all of the judge's service on the commission was simultaneous with the litigation. Thus, the majority fails to follow its own directive to conduct a sensitive evaluation of *all* of the relevant facts and, instead, relies solely on the blanket application of one general principle in support of its conclusion that none of these circumstances could have created even the appearance of impartiality.

The majority also states that a reasonable observer would not believe that Judge Alander disregarded canon 3(a)(4) of the Code of Judicial Conduct, which prohibits ex parte communications between a judge and a party regarding a proceeding. I agree that it would not be reasonable to conclude that Judge Alander and Griffin discussed this particular litigation during the task force meetings. They undoubtedly did discuss, however, the policies and principles that would govern public access to

court documents,[12] an issue central to the resolution of the present case, and Griffin undoubtedly was appointed to the task force because of the Hartford Courant's institutional interest in maximizing public access to those records, a general interest that has taken particular form in the present case. The defendants had no comparable opportunity to shape Judge Alander's views on that issue.

Finally, for the reasons explained in part II of this dissenting opinion, I disagree with the majority's conclusion that the question of whether the trial court improperly vacated the sealing orders is a pure question of law. Accordingly, I would conclude that Judge Alander's improper denial of the defendant's motion requesting that he recuse himself requires a remand for an evidentiary hearing on the question of whether the sealing orders should be vacated.

II

I next address the majority's conclusion that the trial court properly granted the intervenors' motion to vacate the sealing orders. I agree with the majority's conclusion that "any document filed that a court reasonably may rely on in support of its adjudicatory function is a judicial document." I also agree that documents that the trial court has relied on in making a decision are judicial documents subject to the presumption of public access regardless of whether the underlying motions were granted or denied. Finally, I agree with the majority that, ordinarily, the trial court should apply a

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[12] See footnote 11 of this dissenting opinion.

balancing test in determining whether sealing orders should be modified.[13]

For the reasons stated in my dissenting opinion in *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, 276 Conn. 168, 231-41, 884 A.2d 981 (2005) (Sullivan, J., dissenting), however, I disagree with the majority's conclusion that the trial court properly granted the intervenors' motion to vacate the sealing orders under the circumstances of the present case. As I stated in *Rosado*, "[t]he general rule is that intervention *after an action has been terminated* is highly disfavored and will be granted only in extraordinary cases."[14] (Emphasis added.) *Id.*, at 238.

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[13] Because I believe that the trial court applied the wrong standard in determining whether the sealing orders should be vacated, I would not reach the question of whether the defendants waived any claim of privilege when they divulged the documents to the plaintiffs in the underlying cases without raising a claim of privilege.

[14] "See *United States* v. *Associated Milk Producers, Inc.*, 534 F.2d 113, 116 (8th Cir.) ('[t]he general rule is that motions for intervention made *after* entry of final judgment will be granted only upon a strong showing of entitlement and of justification for failure to request intervention sooner'...), cert. denied sub nom. *National Farmers' Organization, Inc.* v. *United States*, 429 U.S. 940, 97 S. Ct. 355, 50 L. Ed. 2d 309 (1976); *Crown Financial Corp.* v. *Winthrop Lawrence Corp.*, 531 F.2d 76, 77 (2d Cir. 1976) (intervention after judgment is unusual and not often granted); *Black* v. *Central Motor Lines, Inc.*, 500 F.2d 407, 408 (4th Cir. 1974) ('[i]ntervention is ancillary and subordinate to a main cause and whenever an action is terminated, for whatever reason, there no longer remains an action in which there can be intervention'); *Abdul-Raheem* v. *Orr*, 672 F. Sup. 1389, 1391 (W.D.Okla. 1986) (when action is terminated, for whatever reason, there no longer remains action in which to intervene); *Mundt* v. *Northwest Explorations, Inc.*, 947 P.2d 827, 830 (Alaska 1997) (motions to intervene made after

I continue to believe that, pursuant to the "judicial policy in favor of judicial economy, the stability of former judgments and finality"; (internal quotation marks omitted) *Lafayette* v. *General Dynamics Corp.*, 255 Conn. 762, 772, 770 A.2d 1 (2001); parties seeking to intervene in terminated actions must show extraordinary circumstances at the intervention stage.

Even if proof of extraordinary circumstances or compelling need is not required at the intervention stage, however, I would conclude that such proof is required to modify sealing orders in terminated cases. By applying the ordinary balancing test, the majority simply ignores the fact that the present case was settled and withdrawn more than one year before the intervenors sought access to the sealed documents, and it treats the motions to vacate the sealing orders in exactly the same way that it would treat such motions in an active case.[15] Thus, the

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conclusion of litigation normally are not timely absent showing of justification); *In re One Cessna 206 Aircraft*, 118 Ariz. 399, 402, 577 P.2d 250 (1978), quoting *United States* v. *Associated Milk Producers, Inc.*, supra, at 116; *State Employees' Credit Union, Inc.* v. *Gentry*, 75 N.C. App. 260, 264, 330 S.E.2d 645 (1985) (motions to intervene made after judgment has been rendered are disfavored and are granted only after finding of extraordinary and unusual circumstances or upon strong showing of entitlement and justification); *Marteg Corp.* v. *Zoning Board of Review*, 425 A.2d 1240, 1243 (R.I. 1981) (because of potential of prejudice to parties, person seeking to intervene after judgment has especially heavy burden)." (Emphasis in original.) *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, supra, 276 Conn. at 238 n.8 (Sullivan, J., dissenting).

[15] The majority in *Rosado* concluded that the trial court had jurisdiction to allow the intervention for purposes of modifying the sealing orders because the orders were injunctive in nature

majority gives no weight at all, at any stage of its analysis, to the judicial policy disfavoring interventions after judgment in the interests of judicial economy, stability of judgments and finality.[16]

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and the trial court always has the power to modify an injunction. *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, supra, 276 Conn. at 213-16. I agree that, when the trial court has granted injunctive relief, the court retains jurisdiction to modify that relief *at the request of a party*. See *AvalonBay Communities, Inc.* v. *Plan & Zoning Commission*, 260 Conn. 232, 242 n.11, 796 A.2d 1164 (2002). As I explained in my dissenting opinion in *Rosado*, however, that does not mean that the trial court has limitless discretion to grant a postjudgment motion to intervene in a case in which the court granted injunctive relief. See *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, supra, at 240 n.11 (*Sullivan, J.*, dissenting). A fortiori, it does not mean that the court has limitless discretion to grant a postjudgment motion to intervene in a case for purposes of modifying an injunction when doing so would undermine the settled expectations of the parties. *Id.*

[16] Whether the trial court should modify sealing orders later than one year after a case has been terminated, when the files are subject to destruction by the court pursuant to Practice Book § 7-10, is a separate question. I continue to believe that "[t]he mere accident that the documents are in the [trial] court's custody in the present case is not a reason for treating the case differently from a case in which the parties and the court diligently fulfilled their obligations with respect to the documents." *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, supra, 276 Conn. at 237 n.6 (Sullivan, J., dissenting). I cannot perceive how the intervenors can have a right of access that is dependent on a mere accident of timing. At the very least, the fact that the sealed documents could have been destroyed before the intervenors ever became involved in the litigation should be considered as part of the balancing test. Moreover, the majority's statement that "[p]arties electing to leave documents in the custody of the court after the time when they are authorized to remove them do so at their peril" is inapposite. Although the defendants may have had the right to

The majority in *Rosado* also concluded that the trial court had not abused its discretion in allowing the intervenors to intervene in the underlying cases even though they had been withdrawn for more than one year because "the trial court's exercise of jurisdiction over the withdrawn cases was limited in scope ... [and] the court restored the withdrawn cases to the docket solely for the purpose of considering the [intervenors'] claim regarding sealed documents in the court's files.... Thus, the court's exercise of jurisdiction over the withdrawn cases did not implicate the substantive rights of the parties to those cases." (Citation omitted.) *Id.*, at 223. Thus, the majority simply assumed that the defendants had no substantive interest in the finality of the settlement and withdrawal of the underlying cases or in avoiding being haled back into court to litigate an issue that had not been raised by any of the parties to the underlying cases and that could have been raised by the intervenors at any time during the eight years that the cases were active. That assumption was, and continues to be, inconsistent with judicial policy in favor of judicial economy, the stability of former judgments and finality and with the strong public policy favoring the pretrial resolution of disputes.

Nor does the majority take into account the fact that the news media, including at least two of the intervenors-the Hartford Courant Company and the New York Times Company-reported extensively on

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remove materials that were not judicial documents from the custody of the court, the majority has pointed to no authority for the proposition that they had the right to remove judicial documents that were attached to motions and were part of the official court file.

the underlying cases from the time that the first action was brought in early January, 1993, through the date that they were settled, that they knew about the sealing orders, and that they never sought to intervene in the cases for the purpose of challenging the sealing orders while the cases were active. This fact belies any suggestion that the intervenors are seeking access to the sealed files in order to "provide the public with a more complete understanding of the judicial system and a better perception of its fairness"; (internal quotation marks omitted) see part II A of the majority opinion; which is the primary rationale for the presumption of public access to judicial records.

Moreover, while I believe that the interests of judicial economy, stability of judgments and finality mandate the application of a more stringent standard for the modification of sealing orders in all terminated cases, they have even greater force when the parties have settled a case in reliance on the existence of sealing orders. See *Securities & Exchange Commission* v. *TheStreet.com*, 273 F.3d 222, 229 (2d Cir. 2001) (modification should not be granted in absence of compelling need or extraordinary circumstances when protective order has been relied upon); see also *Blakeslee Arpaia Chapman, Inc.* v. *EI Constructors, Inc.*, 239 Conn. 708, 742, 687 A.2d 506 (1997) (discussing "[t]he strong public policy favoring the pretrial resolution of disputes" [internal quotation marks omitted]).[17] In

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[17] I do not address the question of whether this standard should apply when the parties reasonably have relied on the permanence of the sealing orders and an intervenor seeks modification of the order *prior* to judgment, as in *Securities & Exchange Commission*. Accordingly, the majority's statement

my view, the defendants reasonably could have relied on the existence of the sealing orders when they settled the cases. In addition, I would conclude that, because they have alleged that they in fact relied on the continued viability of the sealing orders, they are entitled to an evidentiary hearing on that question. See *Duplissie* v. *Devino*, 96 Conn.App. 673, 691, 902 A.2d 30 (whether party relied on representation is question of fact), cert. denied, 280 Conn. 916, 908 A.2d 536 (2006).

The trial court's finding that it was not reasonable for the parties to have relied on the protective order because "it was *clear* from the *express* language of [the sealing orders] that [they were] intended to be temporary" is not supported by the evidence. (Emphasis added.) In addition to providing that the sealing orders would be subject to reconsideration no later than jury selection, the sealing orders also provided that "[a]ll ... documents and transcripts [subject to the sealing orders] which the attorneys representing any of the parties believe in good faith may be entitled to protection from disclosure *after the completion of jury selection*, shall be marked 'CONFIDENTIAL: SUBJECT TO COURT

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that I elevate "reliance to an exalted status that almost always will be outcome determinative in favor of the party seeking to block public access to court documents" is entirely unfounded. (Internal quotation marks omitted.) *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, supra, 276 Conn. at 210. I conclude only that, when the parties have relied on the permanence of the sealing orders *in disposing of the case*, then "the principle ... that the integrity of judgments should be protected ... acts to *limit* the court's power to grant postjudgment intervention for the purpose of modifying a protective order." (Emphasis in original.) *Id.*, at 239 n.9 (*Sullivan, J.*, dissenting).

ORDER' and shall be submitted to the court for review and appropriate order before being released from the protection afforded by this order." (Emphasis added.) Thus, the sealing orders had two functions. First, they immediately prohibited disclosure of any information and materials obtained through the deposition of the defendants. Second, they recognized that at least some of these materials, which were to be marked "CONFIDENTIAL: SUBJECT TO COURT ORDER," could be entitled to protection even after jury selection. As the majority recognizes, numerous documents submitted pursuant to the sealing orders were marked with this notation. It is apparent, therefore, that, rather than clearly and expressly providing that the sealing orders were temporary, the sealing orders clearly and expressly provided, at least with respect to the marked documents, that no determination as to their temporal duration had yet been made. Thus, the trial court, *Levin, J.*, clearly recognized that there might be considerations other than ensuring the defendants' right to a fair trial that would justify sealing some of the documents permanently.

Moreover, even if the sealing orders had expressly provided that they were not intended to be permanent, the defendants reasonably could have believed that they would not be reconsidered until jury selection and they reasonably could have relied on this understanding when they agreed to settle the cases before jury selection.[18] Clearly, the defendants

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[18] The sealing orders provided that the covered materials were not to be disclosed or disseminated to nonparties "[u]ntil further order of the court, which order shall be made not later than the completion of jury selection...." *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, supra, 276 Conn. at 174. Thus,

had a strong incentive to settle the cases before trial in order to avoid the risk that the sealing orders would be vacated or modified. Indeed, if the sealing orders expressly had provided that they were not subject to modification, that would *undermine* the defendants' argument that they settled the cases in reliance on their understanding that they would not be reconsidered until the time of trial. The majority's decision is inconsistent with the strong public policy favoring pretrial resolution of disputes because parties to future cases will be subject to the risk of such publicity regardless of whether they settle a case and, therefore, they will have a reduced incentive to settle.[19]

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the parties reasonably could have believed that the sealing orders would not be modified unless disclosure of a document was required in order to try the case. Indeed, if the defendants in the present case could not reasonably rely on the continued existence of the sealing orders, it is difficult to imagine any circumstances that would give rise to a justifiable reliance. As the defendants point out, under the majority's view, no protective orders will be permanent because they all will be subject to modification upon a showing of "appropriate grounds," even after the underlying case has been settled and terminated. Thus, parties will never be able to establish justifiable reliance.

[19] I recognize that the court in *Securities & Exchange Commission* v. *TheStreet.com*, supra, 273 F.3d at 231, stated that "protective orders that are on their face temporary or limited may not justify reliance by the parties." See also *In re Agent Orange Product Liability Litigation*, 821 F.2d 139, 147 (2d Cir.) (when parties settled case before trial, parties could not have relied on permanence of protective order that applied solely to pretrial stages of litigation), cert. denied sub nom. *Dow Chemical Co.* v. *Ryan*, 484 U.S. 953, 108 S. Ct. 344, 98 L.Ed.2d 370 (1987). In light of "[t]he strong public policy favoring the pretrial resolution of disputes"; (internal quotation marks

Finally, I disagree with the majority that whether the documents contained in the sealed files are judicial documents is a question of law to be resolved by this court in the first instance. Although the definition of "judicial documents" is a legal question, whether a party filed a particular document in support of a motion is a question of fact. As the majority points out, the defendants submitted forty-eight compact discs containing the privilege logs prepared by the defendants and copies of 12,675 pages of sealed documents. Among these materials, the majority identifies fifteen documents that it contends are not judicial documents because they were not filed in support of any motion. I believe that the trial court, and not this court, should answer the factual question of whether a particular document is a judicial document, especially in light of the volume of the documents and the complexity of the underlying cases.

In summary, I believe that the intervenors should have been required to demonstrate that their intervention in the present case was justified by extraordinary circumstances. Even if a showing of extraordinary circumstances was not required at the intervention stage, however, the intervenors should have been required to show extraordinary circumstances or compelling need in order for the trial court to modify the sealing orders, particularly if the defendants relied on the orders in settling the underlying cases. Because the trial court did not apply this standard, I would remand the case to the trial court for an evidentiary hearing. Finally, even if the trial court applied the proper standard for

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omitted) *Blakeslee Arpaia Chapman, Inc.* v. *EI Constructors, Inc.*, supra, 239 Conn. at 742; I disagree with this reasoning.

vacating the sealing orders, I would conclude that the trial court, not this court, should determine in the first instance which of the documents contained in the sealed files are judicial documents. Accordingly, I dissent.

APPENDIX B
Opinion of the Superior Court of Connecticut, Judicial District of Waterbury (Dec. 6, 2006)

Superior Court of Connecticut, Judicial District of Waterbury.

George L. ROSADO, Plaintiff,

v.

BRIDGEPORT ROMAN CATHOLIC DIOCESAN CORPORATION et al., Defendants.

No. X06CV930157085S.

Dec. 6, 2006.

ALANDER, JON M., Judge.

This case is back before this court upon remand from our Supreme Court. See *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, 276 Conn. 168 (2005). The New York Times Company, The Hartford Courant, Globe Newspaper Company and The Washington Post Company (hereinafter, the newspapers) which have intervened in the above captioned action and twenty-two related cases[1] have

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[1] The twenty-three lawsuits in which the newspapers have intervened and filed motions to vacate are: (1) *William Kramer* v. *Bridgeport Roman Catholic Diocesan Corporation, et al.*, Superior Court, Complex Litigation Docket at Waterbury, Docket No. X06-CV-95-0157311 S; (2) *S.P. Carr* v. *Bridgeport Roman Catholic Diocesan Corporation, et al.*, Superior Court, Complex Litigation Docket at Waterbury, Docket No. X06-CV-

95-0159118 S; (3) *M. McDonough* v. *Bridgeport Roman Catholic Diocesan Corporation, et al.*, Superior Court, Complex Litigation Docket at Waterbury, Docket No. X06-CV-97-0157365 S; (4) *J. Knecht* v. *Bridgeport Roman Catholic Diocesan Corporation, et al.*, Superior Court, Complex Litigation Docket at Waterbury, Docket No. X06-CV-96-0157367 S; (5) *William Slosser* v. *Bridgeport Roman Catholic Diocesan Corporation, et al.*, Superior Court, Complex Litigation Docket at Waterbury, Docket No. X06-CV-94-0159073 S; (6) *Ronald Slosser* v. *Bridgeport Roman Catholic Diocesan Corporation, et al.*, Superior Court, Complex Litigation Docket at Waterbury, Docket No. X06-CV-94-0159072 S; (7) *Sandra Forsberg* v. *Bridgeport Roman Catholic Diocesan Corporation, et al.*, Superior Court, Complex Litigation Docket at Waterbury, Docket No. X06-CV-94-0159066 S; (8) *Alvin Koscelek* v. *Bridgeport Roman Catholic Diocesan Corporation, et al.*, Superior Court, Complex Litigation Docket at Waterbury, Docket No. X06-CV-94-0159067 S; (9) *Katherine Landro* v. *Bridgeport Roman Catholic Diocesan Corporation, et al.*, Superior Court, Complex Litigation Docket at Waterbury, Docket No. X06-CV-94-0159068 S; (10) *J.L. Powers* v. *Bridgeport Roman Catholic Diocesan Corporation, et al.*, Superior Court, Complex Litigation Docket at Waterbury, Docket No. X06-CV-94-0159069 S; (11) *Jenilee Rosado* v. *Bridgeport Roman Catholic Diocesan Corporation, et al.*, Superior Court, Complex Litigation Docket at Waterbury, Docket No. X06-CV-94-0159070 S; (12) *James See* v. *Bridgeport Roman Catholic Diocesan Corporation, et al.*, Superior Court, Complex Litigation Docket at Waterbury, Docket No. X06-CV-94-0159071 S; (13) *J. Harding* v. *Bridgeport Roman Catholic Diocesan Corporation, et al.*, Superior Court, Complex Litigation Docket at Waterbury, Docket No. X06-CV-95-0157368 S; (14) *M. Didato* v. *Bridgeport Roman Catholic Diocesan Corporation, et al.*, Superior Court, Complex Litigation Docket at Waterbury, Docket No. X06-CV-95-0157370 S; (15) *John Doe* v. *Bridgeport Roman Catholic Diocesan Corporation, et al.*, Superior Court, Complex Litigation Docket at Waterbury, Docket No. X06-CV-99-0157369 S; (16) *James Krug* v. *Bridgeport Roman Catholic Diocesan Corporation, et al.*, Superior Court, Complex

filed motions to vacate the protective orders entered by the court in those actions.[2] Each of the twenty-three cases involves lawsuits filed in the mid-1990s alleging sexual abuse of minors by clergymen employed by the Bridgeport Roman Catholic Diocesan Corporation. The lawsuits were withdrawn on March 12, 2001. Prior to the withdrawal of the actions, protective orders were issued by the court which, inter alia, authorized the filing of certain documents with the court under seal. The newspapers seek an order vacating that portion of the protective orders which sealed documents filed

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Litigation Docket at Waterbury, Docket No. X06-CV-93-0157366 S; (17) *Jamie Belleville* v. *Bridgeport Roman Catholic Diocesan Corporation, et al.*, Superior Court, Complex Litigation Docket at Waterbury, Docket No. X06-CV-93-0157371 S; (18) *Paul Doyle* v. *Bridgeport Roman Catholic Diocesan Corporation, et al.*, Superior Court, Complex Litigation Docket at Waterbury, Docket No. X06-CV-94-0159065 S; (19) *Theresa Pace* v. *Bridgeport Roman Catholic Diocesan Corporation, et al.*, Superior Court, Complex Litigation Docket at Waterbury, Docket No. X06-CV-95-0157086 S; (20) *Richard Rosado* v. *Bridgeport Roman Catholic Diocesan Corporation, et al.*, Superior Court, Complex Litigation Docket at Waterbury, Docket No. X06-CV95-0157364 S [41 Conn. L. Rptr. 413]; (21) *George Rosado* v. *Bridgeport Roman Catholic Diocesan Corporation, et al.*, Docket No. X06-CV-93-0157085 S [41 Conn. L. Rptr. 723]; (22) *Sharon See* v. *Bridgeport Roman Catholic Diocesan Corporation, et al.*, Docket No. X06-CV-93-0157363 S; and (23) *J. Fleetwood* v. *Bridgeport Roman Catholic Diocesan Corporation, et al.*, Docket No. X06-CV-95-0156274 S.

[2] For a complete procedural history of the newspapers' efforts to intervene and vacate the protective orders in these cases, see *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, 276 Conn. 168 (2005).

with the court.[3] The defendant Bridgeport Roman Catholic Diocesan Corporation and its former officials[4] (collectively, the Diocese) oppose the vacating of the protective orders and the unsealing of the documents. In addition, the Diocese has requested that, to the extent the court concludes that the prior protective orders have expired or should be vacated, the court enter a new protective order sealing the documents in the court file.

I. The Protective Orders

The fountainhead of the current dispute is a protective order issued by the court (Levin, J.) on December 8, 1994, in the matter of *George L. Rosado* v. *Bridgeport Roman Catholic Diocesan Corporation*, Superior Court, judicial district of Fairfield, Docket No. CV93-0300272 S.[5] The defendant Raymond S. Pcolka had moved for a protective order pertaining to depositions of himself, Bishop Walter Curtis and

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[3] The newspapers have withdrawn their request that the court vacate that part of the protective orders which ordered the parties not to disclose to others unfiled discovery material and their request, that unfiled discovery be ordered filed with the court.

[4] The following former officials of the Bridgeport Roman Catholic Diocesan Corporation have joined in Diocese's objection to the motion to vacate: The Reverend Monsignor Laurence Bronkiewicz, the Reverend Monsignor Thomas Driscoll, Bishop Edward Egan and the Reverend Monsignor Andrew Cusack.

[5] The case of *George L. Rosado* v. *Bridgeport Roman Catholic Diocesan Corporation*, Superior Court was affixed the docket number CV 93-0300272 S while it was pending in the judicial district of Fairfield. Its docket number was changed to its current docket number of X06 CV 93-0157085 S upon its transfer to the complex litigation docket in Waterbury.

Bishop Edward Egan scheduled by the plaintiffs in *George L. Rosado* v. *Bridgeport Roman Catholic Diocesan Corporation* and fifteen related cases. Pcolka requested an order protecting certain documents from disclosure on the grounds that they were privileged and an order limiting the further disclosure of documents and information obtained at the depositions.

After a contested hearing, Judge Levin issued a memorandum of decision together with an "addendum" granting in part and denying in part Pcolka's motion for a protective order. In the first section of his decision, Judge Levin, after conducting an in camera review, ordered the disclosure to the plaintiffs of some, but not all, of the documents contained in Pcolka's personnel file. In the decision's second section, Judge Levin issued a protective order denying the plaintiffs' request for documents in the possession of the Diocese concerning allegations of sexual misconduct by any priest who was at any time a member of the Diocese. In the third section of his decision, Judge Levin addressed the defendant's request prohibiting the disclosure to others of information and documents obtained at the depositions. It is this section and the addendum, which contains the court's orders implementing its decision, which lie at the heart of the current dispute. In his decision, Judge Levin stated that the defendants had advanced two principal grounds for the issuance of a protective order: protection of the reputation of the Diocese and its priests and protection of the defendants' right to a fair trial. Judge Levin first concluded that, after hearing the evidence, he was not persuaded that disclosure would so harm the defendants' reputation as to warrant the issuance of a protective order. He did

find, based on the existence of widespread media coverage of the plaintiffs' allegations and the pending cases, that the issuance of a protective order limiting the disclosure of information gained in discovery was necessary to protect the defendants' right to receive a fair trial. Judge Levin issued an addendum to his memorandum of decision which set forth the specifics of the protective order. The addendum was entitled "Protective Order" and contained three provisions: "(1) Until further order of the court, which order shall be made not later than the completion of jury selection, all information, documents and transcripts which the parties may obtain through the depositions of the defendants, including persons designated pursuant to Practice Book §§ 244(g)6, and Bishop Edward Egan shall not be disseminated, shown, disclosed, divulged or transmitted by anyone to any person or organization other than the parties to this lawsuit and their respective attorneys and to any investigators and potential expert witnesses retained by the parties to this lawsuit or their attorneys and stenographic personnel with a need and obligation to see and receive the same; (2) All such documents and transcripts which the attorneys representing any of the parties believe in good faith may be entitled to protection from disclosure after the completion of jury selection, shall be marked 'CONFIDENTIAL: SUBJECT TO COURT ORDER' and shall be submitted to the court for review and appropriate order before being released from the protection afforded by this order; and (3) Whenever any pleading, document or motion referencing, incorporating or attaching any documents described in paragraph one of this order is filed with the court or delivered to any judge thereof, it shall be filed or

delivered under seal pending review by the court or judge and shall be marked by the party filing or delivering same 'CONFIDENTIAL: SUBJECT TO COURT ORDER.' "

The newspapers and the Diocese agree that the same protective order or one similar thereto was entered in twenty-one of the twenty-three consolidated cases. While no party has been able to identify the entry of a protective order in two cases,[6] the Diocese asserts that the sealed documents contained in the files of those two cases are controlled by the protective order entered in *George L. Rosado* v. *Bridgeport Roman Catholic Diocesan Corporation* because the information contained in those documents or the documents themselves were procured pursuant to depositions governed by the *Rosado* protective order.

Subsequent to the entry of the protective orders, 924 documents[7] totaling 12,675 pages were filed with the court under seal in the 23 cases. Though each of the 23 cases was withdrawn on March 12, 2001, the sealed documents remain in the court's files. The newspapers have moved for an order vacating the sealing orders and for access to the documents.

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[6] *J. Knecht* v. *Bridgeport Roman Catholic Diocesan Corporation, et al.*, Superior Court, Complex Litigation Docket at Waterbury, Docket No. X06-CV-96-0157367 S and *Richard Rosado* v. *Bridgeport Roman Catholic Diocesan Corporation, et al.*, Superior Court, Complex Litigation Docket at Waterbury, Docket No. X06-CV95-0157364 S [41 Conn. L. Rptr. 413].

[7] A review of the files reveals that many of the documents are duplicates.

II. Whether the Protective Orders Have Expired

The newspapers first assert that the documents filed with the court under seal should be unsealed because the protective order issued by Judge Levin[8] has expired by its terms or as a matter of law upon withdrawal of the underlying actions. I do not agree.

The newspapers argue that the protective order was by its terms temporary and only intended to extend to the completion of jury selection. In support of their position, they point to the language of the protective order which states that the ban on the disclosure of documents obtained through the deposition of the defendants and Bishop Egan would continue "[u]ntil further order of the court, which order shall be made not later than the completion of jury selection" and the language of the protective order that any documents which a party believes are entitled to protection from disclosure after the completion of jury selection shall be submitted to the court for review and appropriate order before being released from the protection afforded by the protective order. I agree with the newspapers that the cited language of the protective order indicates that Judge Levin intended the protective order to be a temporary order which would be revisited after the completion of jury selection. This intent is also consistent with the purpose of the protective order as expressed in Judge Levin's memorandum of decision

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[8] Both the newspapers and the Diocese agree that the language of the protective order issued in *George L. Rosado* v. *Bridgeport Roman Catholic Diocesan Corporation* is the operative language with respect to all of the protective orders issued in the 23 consolidated cases.

which was to protect the defendants' right to a fair trial. I do not agree that the protective order expired by its own terms upon withdrawal of the actions. Rather, some affirmative step needed to be taken by Judge Levin before the protective order ended or before any documents were released from its protection. While Judge Levin intended to determine after the completion of jury selection which documents, if any, were entitled to continued sealing, that determination was never made because the underlying actions were withdrawn prior to jury selection.

The newspapers next assert that the protective order was an interlocutory order which expired by operation of law upon withdrawal of the underlying actions. I am not persuaded. The newspapers cite in support of the proposition that interlocutory orders automatically expire upon the entry of final judgment case law which holds that pendente lite orders in a marriage dissolution action, see, e.g., *Tobey* v. *Tobey*, 165 Conn. 742, 745 (1974), and *Papa* v. *Papa*, 55 Conn.App. 47, 54-55 (1999), and preliminary injunctions, *Nowell* v. *Nowell*, 157 Conn. 470, 482, cert. denied, 396 U.S. 844 (1969), and *Madison Square Garden Boxing, Inc.* v. *Shavers*, 562 F.2d 141, 144 (2nd Cir. 1977), do not survive entry of final judgment. I do not find either situation to be analogous to the sealing order entered in these cases. Here, the trial court expressly ordered that any documents filed with the court which were obtained by the parties through designated depositions be filed under seal. The newspapers have cited no authority for the proposition that a sealing order automatically expires upon withdrawal of the action or the entry of final judgment. Moreover, their position conflicts with the ruling by the Connecticut

Supreme Court in this case that a trial court retains continuing jurisdiction to restore withdrawn cases to the docket, more than four months after withdrawal, for the limited purpose of determining whether the protective orders should be vacated or modified. *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, 276 Conn. 168, 213-14 (2005). See also *United Nuclear Corp.* v. *Cranford Ins. Co.*, 905 F.2d 1424, 1427, (10th Cir. 1990) cert. denied, 498 U.S. 1073 (1991) ("As long as a protective order remains in effect, the court that entered the order retains the power to modify it, even if the underlying suit has been dismissed."), and *Gambale* v. *Deutsche Bank AG*, 377 F.3d 133, 141 (2nd Cir. 2004) (Dismissal of the action does not terminate the court's supervisory power over sealed documents.). If protective orders automatically expire upon withdrawal of the action, there would be nothing to vacate or modify. The rule proposed by the newspapers would be also unworkable as it would subject to public disclosure upon the withdrawal or dismissal of an action a wealth of confidential information, such as trade secrets, General Statutes § 35-55, alcohol and drug treatment records, § 17a-688, and psychiatric records, § 52-146e, which is shielded by law from public view.

III. Whether the Protective Orders Should be Vacated

A. The Standard to be Used

Our Practice Book and case law are silent on the precise standard that should be used in determining whether a sealing order[9] should be modified or

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[9] The newspapers are in effect seeking to vacate a sealing order, inasmuch as the only portion of the protective order

vacated. The newspapers and the Diocese disagree on what the appropriate standard should be. The Diocese urges this court to adopt the precept first established by the Second Circuit Court of Appeals in *Martindell* v. *International Telephone and Telegraph Corporation*, 594 F.2d 291, 296 (2nd Cir. 1979), that a protective order may be modified only upon a showing of improvidence in the granting of the order or some extraordinary circumstance or compelling need for modification. The Diocese contends that the newspapers have failed to satisfy the *Martindell* standard. The newspapers argue that this court should follow the lead of those jurisdictions which have rejected the Second Circuit test in favor of a rule which balances the competing interests to determine whether to modify a protective order. The newspapers maintain that a balancing of the relevant interests support modification of the protective orders. They further contend that modification is appropriate even under the more stringent *Martindell* test.

A survey of the case law from other jurisdictions concerning the modification of sealing orders is necessary to address the parties' competing claims. In *Martindell* v. *International Telephone and Telegraph Corporation*, supra, the Second Circuit affirmed the trial court's refusal to provide the United States government, a non-party to the action, with access to pretrial depositions which the trial court had previously ordered to be kept confidential and made available only to the parties to the action. The appellate court held that a witness who has been deposed should be entitled to rely on a protective

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issued by Judge Levin which remains in dispute is that portion of the order which seals certain documents filed with the court.

order and the order should not be modified "absent a showing of improvidence in the grant of [the] protective order or some extraordinary circumstance or compelling need." *Martindell* v. *International Telephone and Telegraph Corporation*, supra, 594 F.2d 296.

Subsequently, in *United States* v. *Amodeo*, 44 F.3d 141 (2nd Cir. 1995) ("*Amodeo I*"), and *United States* v. *Amodeo*, 71 F.3d 1044 (2nd Cir. 1995) ("*Amodeo II*") the Second Circuit addressed the contours of the common law right of public access to judicial documents. In *Amodeo I*, the court recognized that the public had a presumptive right of access to "judicial documents." *United States* v. *Amodeo*, supra, 44 F.3d 145. The court then defined a judicial document as those items "relevant to the performance of the judicial function and useful in the judicial process." *Id.* It rejected the approach of the Third Circuit, see, e.g., *Pansy* v. *Borough of Stroudsberg*, 23 F.3d 772, 782 (3rd Cir. 1994), which classified as a judicial document any document actually filed with the court. *Id.* In *Amodeo II*, supra, the court established the standard to be used in balancing the presumption of access to judicial documents against countervailing interests when there is an objection to public access to certain documents. The court held that the weight to be given the presumption of access will depend on the role of the material "in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts." *United States* v. *Amodeo*, supra, 71 F.3d 1049.

In *S.E.C.* v. *TheStreet.Com*, 273 F.3d 222 (2nd Cir. 2001), the Second Circuit clarified the relationship between the presumption against public

access recognized in *Martindell* and the presumption in favor of pubic access endorsed in *Amodeo I* and *Amodeo II*. The issue in *TheStreet.Com* was the propriety of the modification of a protective order by the trial court which unsealed deposition testimony to allow disclosure of the testimony to the intervenor. The court noted that "[w]hile *Martindell* established a general and strong presumption against access to documents sealed under protective order when there was reasonable reliance upon such an order, ... we have held more recently in *United States* v. *Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995) ('*Amodeo I*') that a subspecies of sealed documents in civil cases-so-called 'judicial documents'-deserve a presumption in favor of access." *SEC* v. *TheStreet.com*, supra, 273 F.3d 231. The court resolved the issue of which presumption to apply by determining whether the sealed documents at issue constituted judicial documents. The court held that, in situations involving a request to modify a protective order, the presumption in favor of access applies to those documents which are judicial documents and the presumption against access applies to documents which are not judicial documents. *Id.*, 234.

A number of jurisdictions have considered and expressly rejected the Second Circuit's *Martindell* test. See *Pansy* v. *Borough of Stroudsberg*, 23 F.3d 772, 790 (3rd Cir. 1994); *Beckman Industries, Inc.* v. *International Insurance Company*, 966 F.2d 470, 475 (9th Cir. 1992); *Public Citizen* v. *Liggett Group, Inc.*, 858 F .2d 775, 791 (1st Cir. 1988); *Ballard* v. *Herzke*, 924 S.W.2d 652, 659 (Tenn. 1996); *Holland* v. *Eads*, 624 So.2d 1012, 1016 (Ala. 1993); *Adams* v. *Metallica, Inc.*, 143 Ohio App.3d 482, 492-93 (Ohio Ct.App. 2001); and *State* v. *Philip Morris Inc.*, 606 N.W.2d 676, 687 (Minn.App. 2000). These courts

have adopted a test for modification of protective orders which is based on a balancing of the competing interests. The standard set forth in *Pansy* v. *Borough of Stroudsberg*, supra, 23 F.3d 772, is typical. In *Pansy*, the Third Circuit ruled that once the party seeking modification of a protective order comes forward with a reason to modify the order, the court should balance the various interests involved, including the reliance of the original parties on the confidentiality order. *Id.*, 790. See also *The Republican Company* v. *Appeals Court*, 442 Mass. 218, 225 (2004) ("A 'proper challenge' to the continued validity of [a sealing order] is raised whenever the party seeking to modify the order comes forward with a nonfrivolous reason to do so. Once such a reason is before the court, the obligation of the motion judge is to apply the same balancing test used in determining whether to grant [a sealing order] in the first instance." (Citations omitted.))

The Diocese asserts that the standard established by the Second Circuit in *Martindell* v. *International Telephone and Telegraph Corporation*, supra, 594 F.2d 296, that a protective order should not be modified absent a showing of improvidence in the grant of the protective order or some extraordinary circumstance or compelling need, should apply to the newspapers' request to vacate the protective order sealing the documents filed with the court in this case.[10] I do not agree that the

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[10] The Diocese contends in the alternative that the standard used to determine whether to modify or vacate an injunction is the standard which should be used to modify or vacate a sealing order because our Supreme Court in *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, 276 Conn. 168 (2005), determined that protective orders were injunctive in nature. I

Martindell rule applies to the circumstances surrounding the cases before me.

First, the Second Circuit has made it clear that the *Martindell* test is only applicable "where there has been reasonable reliance by a party or deponent" upon the protective order. *SEC* v. *TheStreet.com*, supra, 273 F.3d 229. See also *In Re Agent Orange Product Liability Litigation*, 821 F.2d 139 (2nd Cir. 1987), cert. denied sub nom. *Dow Chem. Co.* v. *Ryan*, 484 U.S. 953 (1987). In *TheStreet.com*, the court noted that the basis for the strict rule established in *Martindell* was the need to protect the legitimate expectations of the parties that the assurance of confidentiality upon which they reasonably relied would continue to be enforced. *SEC* v. *TheStreet.com*, supra, 273 F.3d 230. The court ruled that the presumption against disclosure contained in the *Martindell* rule did not apply to a protective order which was not reasonably relied upon by the parties. *Id.*, 234-35.

The court in *In Re Agent Orange Product Liability Litigation*, supra, 821 F.2d 139, likewise held that the rule of *Martindell* was inapplicable where it was not reasonable for the parties to have relied on the protective order. The facts of *In Re Agent Orange Product Liability Litigation* closely correspond to the facts here. The trial judge had issued a protective order authorizing the filing of documents deemed confidential by a party with the court under seal. The case subsequently settled. Certain intervening parties sought access to the

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do not agree. While our Supreme Court stated that protective orders are "materially similar to an injunction," *id.*, 213, and "operate like injunctions," *id.*, 215, the court did not equate protective orders with injunctions for all purposes.

sealed documents filed with the court. The Second Circuit affirmed the trial court's modification of the protective order unsealing the documents. The court found that it was not reasonable for the parties to have relied on the protective order because it was not a permanent order. *Id.*, 147. Similarly, it was clear from the express language of Judge Levin's order that it was intended to be temporary. See Part II, pp. 6-7, of this opinion. The protective order issued by Judge Levin contained the very attributes of the order in *In Re Agent Orange Product Liability Litigation* which the Second Circuit found undercut a finding of reasonable reliance: the order by its terms was applicable solely to the pretrial stages of the litigation and it was specifically indicated that the confidentiality issue would be reconsidered upon the commencement of trial. *Id.* It was plainly not reasonable for the Diocese to conclude that the order was a permanent order which would remain unalterable after settlement of the action. "Any reliance on such a sweeping, temporary protective order simply was misplaced." *In Re Agent Orange Product Liability Litigation*, supra, 821 F.2d 147. See also *Lugosch* v. *Pyramid Company of Onondaga*, 435 F.3d 110, 126 (2d Cir. 2006). (The court ruled that it was not reasonable to have expected that documents would always be kept secret based on a confidentiality order which specifically provided that relief from the order could be sought at any time.)

The second reason why the rule of *Martindell* is inapplicable to the case at bar is that it does not apply to documents which are presumptively accessible to the public. The Second Circuit held in *SEC* v. *TheStreet.com*, supra, 273 F.3d 234, that *Martindell*'s presumption against access did not cover judicial documents for which a presumption in

favor of access applied. See also *Iridium India Telecom LTD.* v. *Motorola, Inc.*, 165 Fed. Appx. 878, 881 (2nd Cir. 2005) ("A second exception to *Martindell*'s presumption exists for 'judicial documents.' "). While the Second Circuit in *United States* v. *Amodeo*, supra, 44 F.3d 141 ("*Amodeo I*"), determined that the common law right of public access was limited to "judicial documents," the presumptive right of public access in Connecticut has been established by court rule.[11] See *Clerk of the Superior Court* v. *Freedom of Inf. Comm.*, 278 Conn. 28, 54 (2006) (Palmer, J., concurring) ("[T]he public's presumptive right of access to court proceedings and documents is embodied in our rules of practice"). Practice Book § 11-20A, which governs the sealing of files and documents in civil cases,[12] provides that

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[11] The Diocese maintains that our Supreme Court has determined that the right of public access is limited to judicial documents as they have been defined by the Second Circuit. *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, supra, 276 Conn. 217 n. 54. The Diocese reads the Supreme Court's language in footnote 54 too broadly. The text in the body of the court's opinion indicates that the court was referring to the common law and constitutional rights of public access when it stated in its footnote that the right of public access was limited to judicial documents and did not apply to all documents filed with the court. *Id.* The court was not referring to the right of public access established by the provisions of the practice book which clearly provide the public with a presumptive right of access to documents filed with the court. See, e.g., Practice Book § 11-20A(a) ("Except as otherwise provided by law, there shall be a presumption that documents filed with the court shall be available to the public.").

[12] The current Practice Book rules governing the sealing of court records did not govern the entry by Judge Levin of the sealing order as they had not yet been enacted. They are,

"[e]xcept as otherwise provided by law, there shall be a presumption that documents filed with the court shall be available to the public." Practice Book § 11-20A(a). In contrast to the Second Circuit, Connecticut has decreed that the public has a presumptive right of access to any document filed with the court. Cf. *Pansy* v. *Borough of Stroudsberg*, 23 F.3d 772, 782 (3rd Cir. 1994) (whether or not a document is subject to common law right of public access turns on whether the document has been filed with the court) and *SEC* v. *Waeyenberghe*, 990 F.2d 845, 849 (5th Cir. 1993) (settlement agreement filed with the court is a judicial record to which the public's common-law right of presumptive access applies). Since the documents to which the newspapers seek access in this case have been filed with the court, a presumptive right of access applies to them pursuant to Practice Book § 11-20A(a), and the presumption against access laid down in *Martindell* does not apply.[13]

Although it is manifest that the newspapers are not required to establish that Judge Levin's sealing order was improvidently granted or that an extraordinary circumstance or compelling need mandates modification, the question remains as to the showing that is required to modify or vacate the sealing order. There is no consensus among other jurisdictions as to which party has the burden of

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however, material to the newspapers' pending motion to modify the prior sealing order.

[13] It is not necessary to determine whether the *Martindell* test should govern the modification of a protective order sealing or limiting the disclosure of discovery material not filed with the court as the newspapers have withdrawn their claim for access to such material. See FN.3, supra.

proof or what that burden should be regarding a motion to modify an order sealing documents subject to a presumptive right of public access.[14] The Third Circuit Court of Appeals has ruled that "The party seeking to modify the order of confidentiality must come forward with a reason to modify the order. Once that is done, the court should then balance the interests, including the reliance by the original parties to the order," to determine whether to modify the order. *Pansy* v. *Borough of Stroudsberg*, 23 F.3d 772, 790 (3rd Cir. 1994). The rule in Massachusetts is in accord. The *Republican Company* v. *Appeals Court*, 442 Mass. 218, 225 (2004). Other courts have placed on the party seeking to modify a protective order "the burden of producing evidence sufficient to convince the court that, on the facts of the particular case, the interests favoring continued secrecy do not outweigh the interests favoring disclosure." *Mokhiber* v. *Davis*, 537 A.2d 1100, 1117 (D.C. 1988).

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[14] The newspapers contend that our Supreme Court has determined that the Diocese has the burden of proof and its burden is to establish a compelling interest which overrides the public's right of access. In support of its position, they cite the following statement of *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, supra, 276 Conn. 224: "[T]o the extent that the [newspapers'] motion to vacate the protective orders relates to judicial documents, the [newspapers] interest in such documents is especially great, and the defendants bear a heavy burden of establishing a compelling interest in preventing those documents from being disclosed to the public." I do not agree that the court was addressing the issue of which party had the burden of proof regarding the newspapers' motion to modify the sealing orders, as that issue was not before the court. Rather, the court was simply expressing its agreement with the general proposition that the public has a right of access to judicial documents which can only be overcome by a compelling countervailing interest.

See also *Holland* v. *Eads*, 624 So.2d 1012, 1016 (Ala. 1993) (Adopting the approach of *Mokhiber* v. *Davis*, supra). Still other courts have placed the burden of proof on the party seeking to maintain nondisclosure with the burden ranging from establishing that the current need for secrecy substantially outweighs the presumption of public access, *Hammock* v. *Hoffman-Laroche, Inc.*, 142 N.J. 356, 381-82 (1995); proving convincing reasons to rebut the presumption of openness, *Pulitzer Publ'g Co.* v. *Transit Casualty Co.*, 43 S.W.3d 293, 303-04 (Mo. 2001); and proving a sufficiently compelling interest, *In re Keene Sentinel*, 136 N.H. 121, 130-31 (1992), or compelling reasons, *Kamakana* v. *City and County of Honolulu*, 447 F.3d 1172 (9th Cir. 2006), which overcome the public's right of access. I am persuaded that the party seeking to unseal a document previously sealed by the court should bear the burden of proving that appropriate grounds exist for the modification of the sealing order, which shall include that the initial basis for the sealing order no longer exists, *Mokhiber* v. *Davis*, supra, 537 A.2d 1117, that the sealing order was improvidently granted, *id.*, or that the interests protected by nondisclosure do not outweigh the public's right of access to the document. The interests to be weighed by the court include any reasonable reliance by the parties upon the sealing order. *Pansy* v. *Borough of Stroudsberg*, supra, 23 F.3d 790. Placing such a burden on the movant is consistent with the general rule that the moving party bears the burden of persuasion, *In re Final Grand Jury Rpt., Torrington Police Dept.*, 197 Conn. 698, 712 (1985), and it gives appropriate deference to the fact that a court has previously determined that sealing is warranted.

B.

Applying the aforementioned standard to these cases, the newspapers maintain that the sealing order should be vacated because the original basis for the order no longer exists. They assert that the reason for the issuance of the order was to protect the defendants' right to a fair trial. Since the twenty-three cases have now been settled and withdrawn, there is no longer a need to protect the defendants' right to a fair trial. The Diocese contends that its right to a fair trial remains an active concern because there are currently pending two lawsuits against it which assert claims of sexual abuse by priests similar to the twenty-three cases at issue here. The Diocese also asserts that additional claims of sexual abuse could be brought against it in the future. It argues that the documents should remain sealed in order to protect its right to a fair trial in those cases. I conclude that the newspapers have met their burden of establishing that the initial grounds for the issuance of the sealing order no longer justify the continuation of that order.

As previously noted, Judge Levin issued the sealing order to protect the defendants' right to a fair trial. Judge Levin was concerned that public dissemination prior to trial of documents obtained through discovery coupled with the widespread media coverage of the cases would compromise the defendants' ability to receive a fair trial. As all twenty-three cases have now been settled and withdrawn, the defendants' right to a fair trial in these cases is no longer an ongoing concern. I do not find that the pendency of two other sexual abuse cases or the potential for additional cases justifies the continuation of the sealing order in these twenty-

three cases. It was the protection of the defendants' right to a fair trial in these twenty-three cases which motivated Judge Levin to issue his order. See *Public Citizen* v. *Liggett Group, Inc.*, 858 F.2d 775, 790 (1st Cir. 1988) (dismissal of the underlying action eliminated the need for a protective order which was entered to protect fair trial rights). Moreover, the continued sealing of 924 documents totaling 12,675 pages is not the least restrictive means available to protect the Diocese's right to a fair trial in other cases. There exist reasonable alternatives which will adequately protect the Diocese's fair trial rights. See Practice Book § 11-20A(c) (The court must first consider reasonable alternatives to the issuance of a sealing order and any sealing order must be no broader than necessary to protect the overriding interest sought to be protected.). See also *Press-Enterprise Co.* v. *Superior Court*, 478 U.S. 1, 14 (U.S. 1986) (a preliminary hearing could constitutionally be closed to the public only if specific findings are made demonstrating that reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights). Those alternatives include voir dire. See *State* v. *Reynolds*, 264 Conn. 1, 224 (2003) ("[t]here is no reason to believe that any influence of the pretrial publicity could not have been overcome by the voir dire process.") and *Press-Enterprise Co.* v. *Superior Court*, supra, 478 U.S. 15 ("[t]hrough voir dire, cumbersome as it is in some circumstances, a court can identify those jurors whose prior knowledge of the case would disable them from rendering an impartial verdict.").

The Diocese also asserts that the sealing order should be preserved because it relied upon the order when it settled these cases. I do not agree that the Diocese's reliance upon the sealing order overrides

the public's right of access to the sealed documents because that reliance was not reasonable. Judge Levin's order was not a permanent sealing order. It was intended to be a temporary order which was to govern the proceedings until the commencement of trial and which, by its terms, was subject to reconsideration and modification. It was not reasonable for the Diocese to assume that Judge Levin's order permanently sealed the documents from public view after settlement of the cases. See *In Re Agent Orange Product Liability Litigation*, supra, 821 F.2d 147, and *Lugosch* v. *Pyramid Company of Onondaga*, supra, 435 F.3d 126.

C. Whether Various Privileges Outweigh the Public Right of Access

The Diocese further maintains that the public's right of access to the sealed documents is outweighed by various constitutional, common law and statutory rights and privileges which it asserts apply to individual documents. The rights and privileges which the Diocese asserts prevent disclosure are (1) the privilege governing personnel files under General Statutes § 31-128f; (2) the attorney-client privilege; (3) the clergyman privilege pursuant to General Statutes § 52-146b; (4) the rights provided under the Free Exercise and Establishment Clauses of the First Amendment to the United States Constitution and Article First, Section 3, and Article Seventh of the Connecticut Constitution; (5) the right of privacy; and (6) the statutory privileges governing confidential medical records. The newspapers contend that each of these privileges was waived by the Diocese when it failed to assert the privileges prior to providing the documents to the plaintiffs in these actions.

1. The Privilege Governing Personnel Files

With respect to the Diocese's claim that certain documents are protected from disclosure by the statutory privilege for records contained in personnel files, I conclude that, under the circumstances presented by these cases, the public's right of access to documents filed with the court outweighs the employees' interest in the confidentiality of the personnel files.

The plaintiff in *George L. Rosado* v. *Bridgeport Roman Catholic Diocesan Corporation* in connection with his notice of the depositions of the defendants and Bishop Egan subpoenaed the personnel file of Pcolka. Pcolka moved for a protective order, including an order barring production of his personnel file. The court, Levin, J., after an in camera review of the personnel file, ordered disclosure of the contents of the personnel file[15] to the plaintiff on the grounds that the documents contained in the file were relevant and material to the plaintiff's claims. *George L. Rosado* v. *Bridgeport Roman Catholic Diocesan Corporation*, Superior Court, judicial district of Fairfield, Docket No. CV93-0300272 S (December 8, 1994). Those documents, and documents from personnel files of additional defendants, were subsequently filed under seal with the court by the parties in connection with a variety of motions.

An employee's right to the confidentiality of his personnel file is not absolute. General Statutes § 31-

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[15] The court did not order disclosure of the report of the Institute of Living which was contained in the personnel file because the report appeared to be protected from disclosure by the statutory privilege governing psychiatric records.

128f provides in relevant part that: "No individually identifiable information contained in the personnel file or medical records of any employee shall be disclosed by an employer to any person or entity not employed by or affiliated with the employer without the written authorization of such employee except ... where the disclosure is made ... pursuant to a lawfully issued administrative summons or judicial order, including a search warrant or subpoena ..." Documents in a personnel file which are material and relevant to a legal dispute are subject to disclosure by court order, General Statutes § 31-128f and, once disclosed documents are filed with the court, the public has a right of access to them, Practice Book § 11-20A. The public's right of access to those documents is particularly strong in these cases due to the extraordinary public interest in knowing whether minors in Connecticut were sexually abused by priests employed by the Diocese and whether the Diocese was responsible for perpetuating that abuse. Just as the plaintiffs' right of access to relevant and material documents concerning sexual abuse by priests contained in the personnel files of the defendant priests trumps the privacy of personnel files, so too does the public's right of access to the same information when it is filed with the court.[16]

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[16] To the extent that documents from the personnel files of individual priests were filed with the court for the sole purpose of allowing the court to conduct an in camera review of the documents in the personnel files, the documents remain entitled to sealing. See part IV of this opinion.

2. The Attorney-Client and Clergyman Privileges and the Rights of Privacy and the Free Exercise of Religion

The Diocese also asserts that certain documents are protected from disclosure by (1) the attorney-client privilege; (2) the clergyman privilege pursuant to General Statutes § 52-146b; (3) the Free Exercise and Establishment Clauses of the First Amendment to the United States Constitution and Article First, Section 3, and Article Seventh of the Connecticut Constitution; and (4) the right of privacy. The Diocese does not claim that these rights and privileges which it now contends override the public's right of access to documents filed with the court were asserted by the Diocese prior to the disclosure of the documents to the plaintiffs or the filing of the documents with the court. Rather, it asserts that it did not waive its rights and privileges vis-a-vis the press and the public by disclosure of the documents under a protective order to the plaintiffs and, in the alternative, any waiver attending the disclosure of information to the plaintiffs was limited to the plaintiffs. I do not agree.

"Waiver is the intentional relinquishment or abandonment of a known right or privilege ... Various statutory and contract rights may be waived ... Waiver is based upon a species of the principle of estoppel and where applicable it will be enforced as the estoppel would be enforced. Estoppel has its roots in equity and stems from the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed ... Waiver does not have to be express, but may consist of acts or conduct from which waiver may be implied ... In other words,

waiver may be inferred from the circumstances if it is reasonable to do so." (Citation omitted; internal quotation marks omitted.) *AFSCME, Council 4, Local 704* v. *Dept Of Public Health*, 272 Conn. 617, 623 (2005). See also *Schreck* v. *Stamford*, 72 Conn.App. 497, 500 (2002).

It is undisputed that all of the documents filed under seal with the court were obtained through the depositions of the defendants and Bishop Egan or are based on information received from those depositions. It is also undisputed that during the depositions, neither the Diocese, the individual defendants, nor Bishop Egan objected to disclosure of the documents or information based on the privileges and rights now being asserted by the Diocese. Generally, a privilege is waived by a party in a judicial proceeding where the party fails to properly assert the privilege or object to an attempt by another person to give or exact testimony or other evidence of a privileged communication. See, e.g., Restatement (Third), The Law Governing Lawyers, § 78 (2006) (attorney-client privilege is waived if the client, the client's lawyer, or another authorized agent of the client in a proceeding before a tribunal fails to object properly to an attempt by another person to give or exact testimony or other evidence of a privileged communication); *Gebbie* v. *Cadle Company*, 49 Conn.App. 265 (1998) (the attorney-client privilege was waived regarding a particular topic for purposes of testimony at trial when the party's attorney testified at a pretrial deposition, without objection, concerning the same issue); and *Nguyen* v. *Excel Corp.*, 197 F.3d 200, 207 (5th Cir. 1999) (the failure to object to questions designed to elicit information about confidential communications waived the attorney-client privilege). "If the holder of

the privilege fails to claim his privilege by objecting to disclosure by himself or another witness when he has an opportunity to do so, he waives his privilege as to communications so disclosed." (Citations and internal quotation marks omitted.) *Gebbie* v. *Cadle Company*, supra, 49 Conn.App. 274. The failure to assert the privileges now being asserted by the Diocese at the time that the documents and information were being sought by the plaintiffs and the disclosure of the documents and information to the plaintiffs constitute a waiver of those privileges.

The Diocese contends that it would not be reasonable to imply a waiver because the disclosure of information was made to the plaintiffs under the compulsion of a court order. The Diocese mischaracterizes the nature of the proceedings in these cases. Judge Levin did not order the disclosure of the documents and information obtained by the plaintiffs though the depositions of Pcolka, Curtis and Bishop. Those documents and that information were obtained through the normal discovery process. This is not a situation where the defendants sought to prevent disclosure by asserting privileges and the court overruled the privileges and ordered disclosure.

The Diocese contends that it would not be reasonable to imply a waiver because the disclosure of the information was made to the plaintiffs under an order of confidentiality. The Diocese fails to offer a rationale as to why that is so. Disclosure was made to the plaintiffs of allegedly privileged information without an assertion of the privilege. The fact that further disclosures would not be made does not alter the fact that the privileges have already been breached. See *Westinghouse* v. *Republic of the Philippines*, 951 F.2d 1414, 1430 (3rd Cir. 1991)

(finding waiver of the confidentiality of work-product notwithstanding the existence of a confidentiality agreement). See also *Genentech, Inc.* v. *Intl. Trade Center*, 122 F.3d 1409, 1483 (Fed.Cir. 1997) ("[g]enerally disclosure of confidential communications or attorney work product to a third party, such as an adversary in litigation, constitutes a waiver of privilege as to those items."). Moreover, the Diocese had no assurances that the information would remain sealed, as Judge Levin's protective order expressly stated that the need for confidentiality would be revisited after jury selection.

The Diocese further asserts that any waiver of its privileges is limited to the plaintiffs. In essence, the Diocese seeks to apply the rule of "selective waiver" to its disclosure of the documents to the plaintiffs. Selective waiver permits a party who has disclosed privileged communications to continue asserting the privilege against other parties. *Westinghouse* v. *Republic of the Philippines*, supra, 951 F.2d 1423 n. 7. The Diocese contends that the privileged documents which it disclosed to the plaintiffs in these cases should not be disclosed to the newspapers as any waiver of its privileges was limited to the plaintiffs. In support of its position, it cites *Cabrera* v. *Cabrera*, 23 Conn.App. 330, 340 (1990), in which the Appellate Court held that the execution of written releases limited to specific individuals did not constitute a general waiver of the psychologist-patient privilege provided by General Statutes § 52-146c. I do not agree that the rule of selective waiver should appropriately be applied to the disclosures here.

First, unlike the situation in *Cabrera*, the Diocese did not expressly limit its waiver of its

privileges to a release of documents to the plaintiffs. Moreover, the statute governing the psychologist-patient privilege requires written consent for the disclosure of privileged communications. General Statutes § 52-146c(a)(4). Since the written releases in *Cabrera* were limited to specific individuals, no authorization was provided for the release of the information to anyone else. There is no requirement of written consent for the disclosure of information protected by the attorney-client privilege, the clergyman privilege, or the constitutional rights of privacy and the free exercise of religion.

Second, any confidentiality provided by the privileges asserted by the Diocese was compromised by the disclosure of the information by the Diocese to the plaintiffs. The Diocese cannot now pick and choose among those who seek access to the documents. See *Permian Corp.* v. *United States*, 665 F.2d 1214, 1221 (D.C. Cir. 1981) ("[t]he client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others, or invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit."). To rule otherwise, would allow a party to manipulate use of its privileges through selective assertion. *Salomon Bros. Treasury Litig.* v. *Steinhardt Partners, L.P.* (*In re Steinhardt Partners L.P.*), 9 F.3d 230, 235 (2d Cir. 1993).

Finally, the doctrine of selective waiver is not favored. See *In re Qwest Communications International Inc.*, 450 F.3d 1179, 1186 (10th Cir. 2006) (In declining to adopt the selective waiver rule for the attorney-client privilege, the court, citing decisions from the D.C. Circuit and the First, Second,

Third, Fourth and Sixth Circuits, found that "[t]here is almost unanimous rejection of selective waiver."). But cf. *Diversified Industries, Inc.* v. *Meredith*, 572 F.2d 596 (8th Cir. 1978) (court applied the selective waiver rule to prevent the discovery in civil litigation of material protected by the attorney-client privilege and previously disclosed to the SEC during a formal investigation.). The doctrine is not favored because privileges inhibit the truth seeking process and they should be strictly construed and judiciously applied. *In re Qwest Communications International Inc.*, supra, 450 F.3d 1185.

3. Healthcare Privileges

The Diocese also asserts that certain documents contained in the court's files are protected from disclosure by various healthcare privileges. The privileges claimed by the Diocese are the physician-patient privilege, General Statutes § 52-146o; the psychologist-patient privilege, General Statutes § 52-146c; the psychiatrist-patient privilege, General Statutes §§ 52-146d et seq.; the clinical social worker-patient privilege, General Statutes § 52-146q; and the professional counselor-patient privilege, General Statutes § 52-146s. The newspapers contend that these privileges have been waived because they were not asserted by the Diocese prior to disclosing the documents to the plaintiffs. I do not agree that a waiver of the healthcare privileges can be inferred from the Diocese's failure to previously assert the privileges. An implied waiver is not appropriate with respect to these statutory healthcare privileges because the statutes require a patient's express consent for disclosure and they specifically delimit the exceptions to the general rule of nondisclosure. See *State* v. *Jenkins*, 271 Conn. 165, 183 (2004)

(court refused to recognize an implied waiver of the psychiatrist-patient privilege under § 52-146d). Moreover, a review of the depositions of the individual defendant priests whose healthcare records were filed with the court under seal indicates that they repeatedly objected to any inquiry concerning their medical records.[17]

Where the confidential status of a document is apparent, a claim of privilege may be disposed of without further inquiry. *Babcock* v. *Bridgeport Hospital*, 251 Conn. 790, 847 (1999). Otherwise, the burden of establishing immunity from disclosure rests with the party asserting the privilege. *Id.*, 849.

I have reviewed in camera each of the documents for which the Diocese asserts a healthcare privilege.[18] A privilege does not appropriately apply to a number of these documents for a variety of reasons, including the following: (1) the document did not involve communications relating to diagnosis and treatment by the patient to a healthcare

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[17] A healthcare privilege must generally be asserted by the patient or the physician. Accordingly, the Diocese and its former officials lack standing to assert such a privilege on behalf of another. However, because the record before me indicates that individual priests registered their objection to disclosure of their medical records, it is necessary for me to determine whether the documents are protected from disclosure by a healthcare privilege.

[18] The court has been hampered in its review of the healthcare privilege claims of the Diocese because the Diocese has asserted a broad "healthcare privilege" in its privilege log without specifically identifying for each document which particular statutory privilege it was relying on.

provider[19]; (2) child abuse is known or in good faith suspected, see § 52-146c(c)(4) and § 52-146o(b)(4)[20]; and (3) it was not established that the healthcare provider met the requirements of the statutory privilege, including that the individual practitioner was licensed to practice in Connecticut. In addition, with respect to two documents, it was not clear from the face of the documents, and the Diocese failed to establish, that the documents concerned communications between a psychiatrist and a patient which occurred after October 1, 1961, the effective date of § 52-146d.[21]

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[19] For example, a letter dated April 9, 1990 from Dr. Howard Iger to Rev. Laurence Bronkiewicz is not privileged because it concerns the administrative actions which the Diocese should take regarding an individual priest.

[20] For example, the documents filed with the court under seal include medical records of Pcolka which the Diocese claims are subject to the physician-patient privilege established by General Statutes § 52-146o. That privilege does not apply however because additional documents indicate that Pcolka has been accused of sexual abuse of a minor. See § 52-146o(b) which provides that consent of a patient is not required for disclosure of records of a physician "if child abuse ... is known or in good faith suspected." A child abuse exception also applies to the psychological evaluation dated November 16, 1978 conducted by James Cassidy, PhD., of Rev. Martin Federici and the memorandum dated May 22, 1990 from Leslie Lothstein, PhD. See § 52-146c(c)(4).

[21] The two documents are a letter dated March 20, 1962 from Dr. Jacob Meshken to Monsignor Curtis and a letter dated March 21, 1962 from Dr. William Sires to Rev. Matthew Stapleton. With respect to the former, the letter refers to psychiatric consultations from December 1960 through June 5, 1961. With respect to the latter, the letter gives no dates as to when the evaluation occurred.

I conclude that a statutory privilege applies to the following documents: (1) the report of Dr. Richard Bridburg dated June 26, 1989; (2) a letter dated April 20, 1994 from Dr. Louis Padovano to Monsignor Laurence Bronkiewicz; (3) a letter dated May 29, 1986 from Dr. Mohammed Kabir to Monsignor Andrew Cusack; (4) the affidavit of Santi Neuberger, M.D., dated September 13, 1994; and (5) the affidavit of Santi Neuberger, M.D., dated July 29, 1996. I further conclude that the statutory healthcare privileges which protect these documents from public disclosure outweigh the public's right of access to these documents. Accordingly, with respect to these five documents, the newspaper's motion to vacate the sealing order is denied.

IV. Whether to Unseal Documents Reviewed by the Court In camera

The newspapers seek access to certain documents reviewed by the court in camera. They do not seek access to any documents reviewed in camera by the court but not ordered disclosed to the plaintiffs because the court found the documents to be privileged or otherwise nondiscoverable. The newspapers do seek access to those documents reviewed by the court in camera which the court ordered disclosed to the plaintiffs during discovery. The Diocese objects to the unsealing of any document reviewed by the court pursuant to an in camera proceeding on the grounds that the newspapers do not have a right of access to such documents. I agree with the Diocese that the public right of access does not attach to documents reviewed by the court in camera.

Practice Book § 11-20A governs the sealing of documents filed with the court. It provides that

"[e]xcept as otherwise provided by law, there shall be a presumption that documents filed with the court shall be available to the public." Practice Book § 11-20A(a). The official commentary to the 2005 amendments to the practice book reveals that the words "except as otherwise provided by law" contained in Practice Book § 11-20A(a) are intended to exempt from the operation of the rule the in camera inspection of documents.[22] See also *U.S.* v. *Wolfson*, 55 F.3d 58, 60 (2nd Cir. 1995) (There is no constitutional or common law right of public access to documents reviewed by the court in camera which the court has ruled need not be disclosed to the opposing party.). The reason that documents reviewed by the court in camera are exempt from the presumptive right of public access is obvious-allowing public access to documents inspected in camera would eviscerate the raison d'etre of an in camera review which is to provide the court with a mechanism to address a claim that the document is entitled to confidentiality without disclosing the

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[22] The 2005 commentary provides in relevant part that "[a]s used in subsection (a) above, the words 'except as otherwise provided by law' are intended to exempt from the operation of this rule all established procedures for the sealing or ex parte filing, in camera inspection and/or nondisclosure to the public of documents, records and other materials, as required or permitted by statute; e.g. Gen.Stat. §§ 12-242vv (pertaining to taxpayer information), 52-146c et seq. (pertaining to the disclosure of psychiatric records) and 54-56g (pertaining to the pretrial alcohol education program); other rules of practice; e.g. Practice Book Secs. 7-18, 13-5(6)-(8) and 40-13(c); and/or controlling state or federal case law; e.g. *Matza* v. *Matza*, 226 Conn. 166 (1993) (establishing a procedure whereby an attorney seeking to withdraw from a case due to his client's anticipated perjury at trial may support his motion to withdraw by filing a sealed affidavit for the court's review)."

contents of the document.[23] See *State* v. *Peeler*, 271 Conn. 338, 403 (2004) (In camera review is a means of examining allegedly privileged material without abrogating the privilege itself.). Accordingly, the newspapers' request for access to documents which were filed with the court for the sole purpose of allowing the court to review the documents in camera is hereby denied.[24]

V. Whether to Unseal Document Which Discloses the Identity of Seven Intervening Priests

Seven priests, who were not defendants in the underlying actions, were allowed by the court to intervene for the limited purpose of preventing disclosure of private, confidential material contained in their personnel records. See *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, 60 Conn.App. 134 (2000). The intervenors were granted permission to use the fictitious names of Reverend John Doe 1 through 7 and the parties and their counsel were ordered by the court not to disclose the identity of the intervenors. The names of the seven intervening priests were disclosed during the deposition of Bishop Edward Egan. The transcript of Bishop

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[23] The fact that the newspapers are limiting their request to those documents which the court ordered disclosed to the plaintiffs as part of discovery does not alter the result. Pursuant to the provisions of our practice book, the public does not have a right of access to documents exchanged by the parties in discovery because ordinarily such documents are not filed with the court.

[24] To the extent these same documents may have been subsequently filed with the court for another purpose, the newspapers may be entitled to access to the documents in accordance with other aspects of this decision.

Egan's deposition was subsequently filed with the court under seal by the plaintiff as an exhibit to the plaintiff's objections to defendants' motion for protective order. It is undisputed that the names of five of the intervenors were subsequently publicly disclosed by the Diocese as priests who have been the subject of claims of sexual misconduct. The newspapers seek access to the deposition transcript, including the names of the five intervening priests whose names have now been publicly disclosed. The newspapers have agreed that the names of the two intervenors who have not been publicly identified by the Diocese may remain under seal.[25] The newspapers contend that they are entitled to access to the sealed document which discloses the names of the five priests because the initial basis for the sealing order no longer exists. The intervening priests argue that the unsealing of the document is not warranted because they reasonably relied upon the protective order and disclosure would violate their right to privacy.

As noted previously, the newspapers bear the burden of proving that appropriate grounds exist for the modification of the sealing order. Such grounds include that the initial basis for the sealing order no longer exists. The newspapers argue that the sealing order is no longer necessary due to the public disclosure by the Diocese of the names of the five intervenors as priests who have been the subject of claims of sexual misconduct. I agree. The priests intervened in this case to protect their rights to the confidentiality of their personnel files. They sought

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[25] Accordingly, the names of John Doe Priest No. 1 and John Doe Priest No. 2 shall remain sealed.

anonymity because disclosure of their names in connection with these lawsuits would have revealed that there existed "complaints, accusations, allegations, reports and rumors" concerning sexual misconduct by them. See *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, supra, 60 Conn.App. 135. Since it has been publicly revealed that the five intervening priests have been the subject of complaints of sexual misconduct, no interest would be served in continuing to seal their names from public view and the right of public access to documents filed with the court should prevail.

VI. Whether to Grant the Diocese's Motion to Seal

The Diocese has asked the court to issue a new order sealing the documents filed with the court should the court grant the newspapers' motion to vacate the prior sealing orders. The newspapers object to any sealing order.

A motion to seal documents filed with the court is governed by Practice Book § 11-20A which provides in pertinent part that "[t]he judicial authority may order that files, affidavits, documents, or other materials on file or lodged with the court or in connection with a court proceeding be sealed or their disclosure limited only if the judicial authority concludes that such order is necessary to preserve an interest which is determined to override the public's interest in viewing such materials." Practice Book § 11-20A(c). For the reasons which I have cited in my determination that the prior sealing orders should be vacated, I conclude that the Diocese has not established that a sealing order is necessary to preserve an interest which overrides the public's

right of access to the documents previously filed with the court.

VII. Conclusion

In light of the above, the newspapers' motion to vacate the sealing orders is granted except with respect to the following documents and information filed under seal in these consolidated cases, which shall remain sealed: (1) the documents which I have determined to be appropriately subject to a healthcare privilege; (2) documents filed with the court for the sole purpose of allowing the court to review the documents in camera; and (3) the names of John Doe Priest No. 1 and John Doe Priest No. 2. The Diocese's motion to seal the documents filed with the court is denied.

APPENDIX C
Opinion of the Superior Court of Connecticut, Judicial District of Fairfield (Dec. 8, 1994)

Superior Court of Connecticut, Judicial District of Fairfield.

George L. ROSADO, et al., Plaintiffs,

v.

BRIDGEPORT ROMAN CATHOLIC DIOCESAN CORPORATION, et al., Defendants.

No. CV 93 0300272 S.

Dec. 8, 1994.

OPINION AND ORDER

LEVIN, Judge.

The plaintiff alleges that he was sexually assaulted by the defendant Raymond Pcolka while Pcolka was a priest employed by the defendant Bridgeport Roman Catholic Diocesan Corporation (Diocese). During the times that the plaintiff alleges that he was assaulted by Pcolka, the defendant Bishop Walter Curtis was the chief officer of the Diocese. The plaintiff alleges that the Diocese and Bishop Curtis are liable for his assault based on their negligent supervision of Pcolka and on the doctrine of respondeat superior.

The plaintiff noticed the depositions of Pcolka, Bishop Curtis and Bishop Edward Eagan. Pursuant to Practice Book § 244(f)[1] the plaintiff included in that notice a request that the defendants produce certain documents at those depositions. Pursuant to Practice Book § 221,[2] the defendants have moved for protective orders with respect to those requests to produce and also have moved for a protective order with respect to the "use and dissemination" of discovery information obtained through the depositions.

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[1] Practice Book § 244(f) provides: "The notice [of deposition] to a party deponent may be accompanied by a request made in compliance with Sec. 226 for the production of documents and tangible things at the taking of the deposition. The procedure of Sec. 226 shall apply to the request."

[2] Practice Book "Sec. 221. Protective Order (Discovery and Depositions) Upon motion by a party from whom discovery is sought, and for good cause shown, the court may make any order which justice requires to protect a party from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court."

Practice Book § 226 merely is a heading for subsequent sections pertaining to requests for production, inspection and examination. Practice Book § 227 provides: "(a) In any civil action, in any probate appeal, or in any administrative appeal where the court finds it reasonably probable that evidence outside the record will be required, any party may serve in accordance with Sec. 120 upon any other party a request to afford the party submitting the request the opportunity to inspect, copy, photograph or otherwise reproduce designated documents (including, but not limited to, writings, drawings, graphs, charts, photographs and phonograph records) or to inspect and copy, test or sample any tangible things in the possession, custody or control of the party upon whom the request is served or to permit entry upon designated land or other property for the purpose of inspection, measuring, surveying, photographing, testing or sampling the property or any designated object or operation thereon. Such requests will be governed by the provisions of Sec. 217. In all personal injury actions except those alleging death or product liability, the requests for production served shall be limited to those set forth in Practice Book Forms 106.11A and 106.11B, unless, upon motion, the court determines that such requests for production are inappropriate or inadequate in the particular action.

"Requests for production may be served upon any party without leave of court at any time after the return day.

"The request shall clearly designate the items to be inspected either individually or by category. The request shall specify a reasonable time, place and manner of making the inspection. Unless the court

orders otherwise, the frequency of use of requests for production in all actions except those for which requests for production have been set forth in Practice Book Forms 106.11A and 106.11B is not limited.

"(b) The party serving such request shall not file it with the court."

I.

With respect to the defendants' motion for protective order directed to the plaintiff's request that the defendants produce documents kept by them pertaining to the defendant Pcolka, the court finds that all such documents are contained in what constitutes a "personnel file", as defined in General Statutes § 31-128a(3).[3] This is so notwithstanding evidence that the Diocese, in fact, may not be the "employer" of Pcolka for all purposes. However, the plaintiff has alleged that the Diocese is Pcolka's employer, the Diocese and the Roman Catholic

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[3] General Statutes § 31-128a(3) provides: " 'Personnel file' means papers, documents and reports pertaining to a particular employee which are used or have been used by an employer to determine such employee's eligibility for employment, promotion, additional compensation, transfer, termination, disciplinary or other adverse personnel action including employee evaluations or reports relating to such employee's character, credit and work habits. 'Personnel file' does not mean stock option or management bonus plan records, medical records, letters of reference or recommendations from third parties including former employers, materials which are used by the employer to plan for future operations, information contained in separately maintained security files, test information, the disclosure of which would invalidate the test, or documents which are being developed or prepared for use in civil, criminal or grievance procedures...."

Church are organizations sui generis, and the evidence indicates that, if only for purposes of discovery, it is appropriate to treat the Diocese as the employer. The contents of that personnel file are subject to disclosure in the discretion of the court pursuant to the express terms of General Statutes § 31-128f, notwithstanding Pcolka's claims to the contrary.

General Statutes § 31-128f provides in relevant part: "No individually identifiable information contained in the personnel file or medical records of any employee shall be disclosed by an employer to any person or entity not employed by or affiliated with the employer without the written authorization of such employee except ... where the disclosure is made ... (2) pursuant to a lawfully issued ... judicial order, including a ... subpoena, or in response to ... defense of personnel-related complaints against the employer...." Notably, neither this statute nor any other to which the court's attention has been directed confers a general privilege or confidential status on the personnel files of private institutions. Compare General Statutes §§ 52-146b to 52-146q; cf. General Statutes § 1-19(b)(2) (restricting the disclosure of personnel files of a public agency; *Hartford* v. *Freedom of Information Commission*, 201 Conn. 421, 429-30, 518 A.2d 49 [1986]).

That the file is subject to disclosure, however, does not end the matter. " 'The granting or denial of a discovery request rests in the sound discretion of the court.' *Standard Tallow Corporation* v. *Jowdy*, 190 Conn. 48, 57, 459 A.2d 503 (1983); *Kiessling* v. *Kiessling*, 134 Conn. 564, 568, 59 A.2d 532 (1948). That discretion applies to 'decisions concerning whether the information is material, privileged,

substantially more available to the disclosing party, or within the disclosing party's knowledge, possession or power....' *Standard Tallow Corporation* v. *Jowdy*, supra, 59-60." *Brown* v. *Housing Authority*, 23 Conn.App. 624, 583 A.2d 643 (1990). " 'Discretion means a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice.' " *State* v. *Arbour*, 29 Conn. App. 744, 748, 618 A.2d 60 (1992).

Generally, the rules of civil discovery are liberally construed. *Lougee* v. *Grinnell*, 216 Conn. 483, 489, 582 A.2d 456 (1990); *Sanderson* v. *Steve Snyder Enterprises, Inc.*, 196 Conn. 134, 140, 491 A.2d 389 (1985). This judicial policy, however, is qualified where the object of discovery is a personnel file. "The disclosure of such information must be carefully tailored to a legitimate and demonstrated need for such information in any given case. Where disclosure of the personnel file would place in the hands of a [party] irrelevant or personal and sensitive information concerning ... [another], the entire file should not be disclosed. No ... [party] has the right to conduct a general 'fishing expedition' into the personnel records of a[nother]. Any request for information that does not directly relate to legitimate issues that may arise in the course of the ... [trial] ought to be denied. In recognizing the danger of permitting the disclosure of personnel records of any witness or litigant, one court has said: 'It has been widely noted that such records often contain raw data, uncorroborated complaints, and other information which may or may not be true but may be embarrassing, although entirely irrelevant to any issue in the case, even as to credibility.' *People* v. *Sumpter*, 75 Misc.2d 55, 60, 347 N.Y.S.2d 670 (1973).

Because discovery of matters contained in a ... personnel file involves careful discrimination between material that relates to the issues involved and that which is irrelevant to those issues, the judicial authority should exercise its discretion in determining what matters shall be disclosed. An in camera inspection of the documents involved, therefore, will under most circumstances be necessary. See *United States* v. *Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974); *Commonwealth* v. *Dominico*, [1 Mass.App.Ct. 693, 306 N.E.2d 835 (1974)]; *People* v. *Bottom*, 76 Misc.2d 525, 351 N.Y.S.2d 328 (1974).... [I]n resolving requests for disclosure, routine access to personnel files is not to be had. Requests for information should be specific and should set forth the issue in the case to which the personnel information sought will relate. The trial court should make available to the [party] only information that it concludes is clearly material and relevant to the issue involved. See *People* v. *Fraiser*, 75 Misc.2d 756, 757, 348 N.Y.S.2d 529 (1973) (subpoena duces tecum issued for personnel files of police witnesses in prosecution for possession and sale of controlled drugs). In this regard, the trial court should exercise its discretion in deciding the temporal relevancy or remoteness of material sought. Cf. *State* v. *Carbone*, 172 Conn. 242, 262, 374 A.2d 215, cert. denied, 431 U.S. 967, 97 S.Ct. 2925, 53 L.Ed.2d 1063 (1977); *State* v. *Mahmood*, 158 Conn. 536, 540, 265 A.2d 83 (1969); *State* v. *Towles*, 155 Conn. 516, 523-24, 235 A.2d 639 (1967) (relating to the introduction of evidence at trial); see also 1 Wharton, Criminal Evidence (12th Ed.) 151. Because the law furnishes no precise or universal test of relevancy, the question must be determined on a case by case basis according to the

teachings of reason and judicial experience." *State* v. *Januszewski*, 182 Conn. 142, 172-173, 438 A.2d 679 (1980), cert. denied, 453 U.S. 922, 101 S.Ct. 3159, 69 L.Ed.2d 1005 (1981); see *State* v. *Harris*, 227 Conn. 751, 765-768, 631 A.2d 309 (1993). Although *Januszewski* involved an attempt by a criminal defendant to subpoena the personnel file of a police officer witness in a criminal prosecution in order to impeach the officer's credibility, the policies and pronouncements in that case are largely applicable here. In camera review by the court reasonably satisfies the plaintiff's need for information necessary to establish his case while respecting a civil defendant's limited expectation of privacy in his personnel file as reflected in the implicit policy of General Statutes § 31-128f that the documents in such files not be cavalierly divulged by an employer.

Accordingly, the court has undertaken an in camera review of Pcolka's personnel file and orders certain documents disclosed to the plaintiff contemporaneously with the filing of this decision. The report of the Institute of Living, to which reference was made during oral argument, shall not be disclosed at this time, there having been no showing that that report is not protected from disclosure by General Statutes §§ 52-146d to 52-146f.[4]

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[4] General Statutes "Sec. 52-146d. (Formerly Sec. 52-146a). Privileged communications between psychiatrist and patient. Definitions. As used in sections 52-146d to 52-146i, inclusive:

"(1) 'Authorized representative' means (A) a person empowered by a patient to assert the confidentiality of communications or records which are privileged under sections 52-146c to 52-146i, inclusive, or (B) if a patient is deceased, his personal representative or next of kin, or (C) if a patient is incompetent

to assert or waive his privileges hereunder, (i) a guardian or conservator who has been or is appointed to act for the patient, or (ii) for the purpose of maintaining confidentiality until a guardian or conservator is appointed, the patient's nearest relative;

"(2) 'Communications and records' means all oral and written communications and records thereof relating to diagnosis or treatment of a patient's mental condition between the patient and a psychiatrist, or between a member of the patient's family and a psychiatrist, or between any of such persons and a person participating under the supervision of a psychiatrist in the accomplishment of the objectives of diagnosis and treatment, wherever made, including communications and records which occur in or are prepared at a mental health facility;

"(3) 'Consent' means consent given in writing by the patient or his authorized representative;

"(4) 'Identifiable' and 'identify a patient' refer to communications and records which contain (A) names or other descriptive data from which a person acquainted with the patient might reasonably recognize the patient as the person referred to, or (B) codes or numbers which are in general use outside of the mental health facility which prepared the communications and records;

"(5) 'Mental health facility' includes any hospital, clinic, ward, psychiatrist's office or other facility, public or private, which provides inpatient or outpatient service, in whole or in part, relating to the diagnosis or treatment of a patient's mental condition;

"(6) 'Patient' means a person who communicates with or is treated by a psychiatrist in diagnosis or treatment;

"(7) 'Psychiatrist' means a person licensed to practice medicine who devotes a substantial portion of his time to the practice of psychiatry, or a person reasonably believed by the patient to be so qualified."

General Statutes "Sec. 52-146e. Disclosure of communications. (a) All communications and records as defined in section 52-146d shall be confidential and shall be subject to the provisions of sections 52-146d to 52-146j, inclusive. Except as provided in sections 52-146f to 52-146i, inclusive, no person may disclose or

transmit any communications and records or the substance or any part or any resume thereof which identify a patient to any person, corporation or governmental agency without the consent of the patient or his authorized representative.

"(b) Any consent given to waive the confidentiality shall specify to what person or agency the information is to be disclosed and to what use it will be put. Each patient shall be informed that his refusal to grant consent will not jeopardize his right to obtain present or future treatment except where disclosure of the communications and records is necessary for the treatment.

"(c) The patient or his authorized representative may withdraw any consent given under the provisions of this section at any time in a writing addressed to the person or office in which the original consent was filed. Withdrawal of consent shall not affect communications or records disclosed prior to notice of the withdrawal."

General Statutes "Sec. 52-146c. Privileged communications between psychologist and patient. (a) As used in this section:

"(1) 'Person' means an individual who consults a psychologist for purposes of diagnosis or treatment;

"(2) 'Psychologist' means an individual licensed to practice psychology pursuant to chapter 383;

"(3) 'Communications' means all oral and written communications and records thereof relating to the diagnosis and treatment of a person between such person and a psychologist or between a member of such person's family and a psychologist;

"(4) 'Consent' means consent given in writing by the person or his authorized representative;

"(5) 'Authorized representative' means (A) an individual empowered by a person to assert the confidentiality of communications which are privileged under this section, or (B) if a person is deceased, his personal representative or next of kin, or (C) if a person is incompetent to assert or waive his privileges hereunder, (i) a guardian or conservator who has been or is appointed to act for the person, or (ii) for the purpose of maintaining confidentiality until a guardian or conservator is appointed, the person's nearest relative.

"(b) Except as provided in subsection (c) of this section, in civil and criminal actions, in juvenile, probate, commitment and arbitration proceedings, in proceedings preliminary to such actions or proceedings, and in legislative and administrative proceedings, all communications shall be privileged and a psychologist shall not disclose any such communications unless the person or his authorized representative consents to waive the privilege and allow such disclosure. The person or his authorized representative may withdraw any consent given under the provisions of this section at any time in a writing addressed to the individual with whom or the office in which the original consent was filed. The withdrawal of consent shall not affect communications disclosed prior to notice of the withdrawal.

"(c) Consent of the person shall not be required for the disclosure of such person's communications:

"(1) If a judge finds that any person after having been informed that the communications would not be privileged, has made the communications to a psychologist in the course of a psychological examination ordered by the court, provided the communications shall be admissible only on issues involving the person's psychological condition;

"(2) If, in a civil proceeding, a person introduces his psychological condition as an element of his claim or defense or, after a person's death, his condition is introduced by a party claiming or defending through or as a beneficiary of the person, and the judge finds that it is more important to the interests of justice that the communications be disclosed than that the relationship between the person and psychologist be protected;

"(3) If the psychologist believes in good faith that there is risk of imminent personal injury to the person or to other individuals or risk of imminent injury to the property of other individuals;

"(4) If child abuse, abuse of an elderly individual or abuse of an individual who is disabled or incompetent is known or in good faith suspected;

"(5) If a psychologist makes a claim for collection of fees for services rendered, the name and address of the person and the amount of the fees may be disclosed to individuals or agencies involved in such collection, provided notification that such

disclosure will be made is sent, in writing, to the person not less than thirty days prior to such disclosure. In cases where a dispute arises over the fees or claims or where additional information is needed to substantiate the claim, the disclosure of further information shall be limited to the following: (A) That the person was in fact receiving psychological services, (B) the dates of such services, and (C) a general description of the types of services; or

"(6) If the communications are disclosed to a member of the immediate family or legal representative of the victim of a homicide committed by the person where such person has, on or after July 1, 1989, been found not guilty of such offense by reason of mental disease or defect pursuant to section 53a-13, provided such family member or legal representative requests the disclosure of such communications not later than six years after such finding, and provided further, such communications shall only be available during the pendency of, and for use in, a civil action relating to such person found not guilty pursuant to section 53a-13."

General Statutes "Sec. 52-146f. Consent not required for disclosure, when. Consent of the patient shall not be required for the disclosure or transmission of communications or records of the patient in the following situations as specifically limited:

"(1) Communications or records may be disclosed to other persons engaged in the diagnosis or treatment of the patient or may be transmitted to another mental health facility to which the patient is admitted for diagnosis or treatment if the psychiatrist in possession of the communications or records determines that the disclosure or transmission is needed to accomplish the objectives of diagnosis or treatment. The patient shall be informed that the communications or records will be so disclosed or transmitted. For purposes of this subsection, persons in professional training are to be considered as engaged in the diagnosis or treatment of the patients.

"(2) Communications or records may be disclosed when the psychiatrist determines that there is substantial risk of imminent physical injury by the patient to himself or others or when a psychiatrist, in the course of diagnosis or treatment of the patient, finds it necessary to disclose the communications or records for the purpose of placing the patient in a mental health

facility, by certification, commitment or otherwise, provided the provisions of sections 52-146d to 52-146j, inclusive, shall continue in effect after the patient is in the facility.

"(3) Except as provided in section 17-295c, the name, address and fees for psychiatric services to a patient may be disclosed to individuals or agencies involved in the collection of fees for such services. In cases where a dispute arises over the fees or claims or where additional information is needed to substantiate the fee or claim, the disclosure of further information shall be limited to the following: (A) That the person was in fact a patient; (B) the diagnosis; (C) the dates and duration of treatment; and (D) a general description of the treatment, which shall include evidence that a treatment plan exists and has been carried out and evidence to substantiate the necessity for admission and length of stay in a health care institution or facility. If further information is required, the party seeking the information shall proceed in the same manner provided for hospital patients in section 4-105.

"(4) Communications made to or records made by a psychiatrist in the course of a psychiatric examination ordered by a court or made in connection with the application for the appointment of a conservator by the probate court for good cause shown may be disclosed at judicial or administrative proceedings in which the patient is a party, or in which the question of his incompetence because of mental illness is an issue, or in appropriate pretrial proceedings, provided the court finds that the patient has been informed before making the communications that any communications will not be confidential and provided the communications shall be admissible only on issues involving the patient's mental condition.

"(5) Communications or records may be disclosed in a civil proceeding in which the patient introduces his mental condition as an element of his claim or defense, or, after the patient's death, when his condition is introduced by a party claiming or defending through or as a beneficiary of the patient and the court or judge finds that it is more important to the interests of justice that the communications be disclosed than that the relationship between patient and psychiatrist be protected."

"(6) Communications or records may be disclosed to the commissioner of health services in connection with any

II.

In his notices of deposition the plaintiff also has requested "[a]ll documents, correspondence, memoranda, notes, communications, concerning any complaints, investigations, disciplinary proceedings, or dispositions ever received by the diocese, the bishop or any agent of [sic] employee of the Diocese regarding sexual misconduct by [any] priests who at any time were members of the Diocese. Any records concerning any documents concerning sexual misconduct by [any] priests which may have been transferred or destroyed and are thus no longer in the possession of the Diocese." (Sic)

A request for production of documents whether made in connection with a notice of deposition or made independent of such a notice must be within the ambit of the scope of discovery as defined in Practice Book § 218. See Practice Book §§ 227, 244(f). Practice Book § 218 provides in relevant part: "In any civil action ... a party may obtain in accordance with the provisions of this chapter discovery of

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inspection, investigation or examination of an institution, as defined in subsection (a) of section 19a-490, authorized under section 19a-498.

"(7) Communications or records may be disclosed to a member of the immediate family or legal representative of the victim of a homicide committed by the patient where such patient has, on or after July 1, 1989, been found not guilty of such offense by reason of mental disease or defect pursuant to section 53a-13, provided such family member or legal representative requests the disclosure of such communications or records not later than six years after such finding, and provided further, such communications shall only be available during the pendency of, and for use in, a civil action relating to such person found not guilty pursuant to section 53a-13.

information or disclosure, production and inspection of papers, books or documents material to the subject matter involved in the pending action, which are not privileged, whether the discovery or disclosure relates to the claim or defense of the party seeking discovery or to the claim or defense of an other party, and which are within the knowledge, possession or power of the party or person to whom the discovery is addressed. Discovery shall be permitted if the disclosure sought would be of assistance in the prosecution or defense of the action and if it can be provided by the disclosing party or person with substantially greater facility than it could otherwise be obtained by the party seeking disclosure. It shall not be ground for objection that the information sought will be inadmissible at trial if the information sought appears *reasonably calculated to lead to the discovery of admissible evidence*." (Emphasis added.)

It is axiomatic that whether evidence is admissible is a function of the manner in which that evidence is presented and the rules of evidence. However, in general, unless excluded by some rule or principle of law, any fact may be proved which logically tends to aid the trier in the determination of an issue. *Burns* v. *Gould*, 172 Conn. 210, 214, 374 A.2d 193 (1977). The scope of discovery, therefore, must be ascertained with reference to the issues in the case, recognizing, however, that "[i]nformation material to the subject matter of a lawsuit certainly includes a broader spectrum of data than that which is material to the precise issues raised in the pleadings." *Lougee* v. *Grinnell*, supra, 216 Conn. 489. (1990).

In his complaint, the plaintiff alleges that the Diocese and Bishop Curtis are liable to him for

Pcolka's acts under the doctrine of respondeat superior and also because they were negligent in that they knew or should have known of Pcolka's aberrant conduct or nature yet permitted him to have access to young people.

" 'The underlying rationale of the modern doctrine of respondeat superior ... is that "every man who prefers to manage his affairs through others, remains bound to so manage them that third persons are not injured by any breach of legal duty on the part of such others while they are engaged upon his business and within the scope of their authority." *Wolf* v. *Sulik*, 93 Conn. 431, 436, 106 A. 443 [1919]; *Durso* v. *A.D. Cozzolino, Inc.*, 128 Conn. 24, 27, 20 A.2d 392 [1941]. But *it must be the affairs of the principal, and not solely the affairs of the agent, which are being furthered* in order for the doctrine to apply.' (Emphasis added.) *Mitchell* v. *Resto*, 157 Conn. 258, 262, 253 A.2d 25 (1968); see also *Cardona* v. *Valentin*, 160 Conn. 18, 22, 273 A.2d 697 (1970) (employer liable for wilful torts of his employee when they are committed in furtherance of the employer's business)." *Gutierrez* v. *Thorne*, 13 Conn. App. 493, 537 A.2d 527 (1988). The plaintiff has not explained, nor has the court divined, how pouring through the personnel files of numerous clergymen other than Pcolka could reasonably lead to the discovery of evidence material to the issue of respondeat superior.

With respect to the plaintiff's claim that the Diocese and Bishop Curtis were negligent in their supervision of Pcolka, the plaintiff argues that if they were allowed to uncover numerous other incidents of sexual abuse of children by other priests this would be evidence that the Diocese should have promulgated policies proscribing priests from

bringing children to their private rooms. Firstly, that is not what he plaintiff has alleged. Secondly, assuming ad Arguendo that Pcolka performed the heinous acts alleged against him, and that those acts were outside the scope of his employment; *Gutierrez* v. *Thorne*, supra, 13 Conn.App. 493-499; the Diocese and Bishop Curtis would be liable only if they knew or had reason to know that Pcolka had the propensity for such conduct. Restatement (Second) Torts § 317(b)(ii),[5] and Comment c of the Reporter's Notes thereto; *Simmons* v. *Baltimore Orioles, Inc.*, 712 F.Sup. 79, 81 (W.D.Va. 1989); *Peck* v. *Siau*, 65 Wash.App. 285, 293-94, 827 P.2d 1108, 1113 (1992); *Broderick* v. *King's Way Assembly of God Church*, 808 P.2d 1211, 1221 (Alaska 1991); *Bender* v. *First Church of the Nazarene*, 59 Ohio App.3d 68, 571 N.E.2d 475 (1989); *Destefano* v. *Grabian*, 763 P.2d 275, 287-288 (Colo. 1988).

The plaintiff relies on *Hutchinson* v. *Luddy*, 606 A.2d 905 (Pa.Super. 1992), involving claims against a priest, a bishop and a diocese similar to those here. In that case, the trial court granted a widesweeping request for production, such as that sought here, and

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[5] Restatement (Second) Torts § 317, entitled "Duty of Master to Control Conduct of Servant", provides: "A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if (a) the servant (i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or (ii) is using a chattel of the master, and (b) the master (i) knows or has reason to know that he has the ability to control his servant, and (ii) *knows or should know of the necessity and opportunity for exercising such control.*" (Emphasis added.)

the appeals court affirmed. In *Hutchinson*, however, the issue was not whether such a request was within the scope of permissible discovery. Rather, the issue, as framed by the court on appeal was "whether a church can avoid the discovery of relevant information in a civil action against the church by putting it in a place which is designated by canon law as a 'secret archive.' " *Id.*, 906. "It is the general rule that a case resolves only those issues explicitly decided in the case." *State* v. *Ouellette*, 190 Conn. 84, 91, 459 A.2d 1005 (1983).

It is, of course, possible that admissible evidence might be discovered were the court to allow the plaintiff to scour the personnel files of the many priests who have served the Diocese since its inception. That, however, is not the test to which this court is duty-bound to adhere. Broadly construing both the allegations of the complaint and the scope of discovery, the court finds that this request for documents is not reasonably calculated to lead to the discovery of admissible evidence. Practice Book § 218. Moreover, the evidence adduced by the Diocese established that attempting to comply with such a request would impose undue burden and expense on the Diocese. Practice Book § 221. As to this aspect of the subpoenas, the defendants' motion for a protective order is granted.

III.

The defendants seek a protective order prohibiting the disclosure to others of information and documents obtained through the depositions of the defendants and Bishop Eagan.

"At the outset, it is important to recognize the extent of the impairment of First Amendment rights

that a protective order, such as the one at issue here, may cause. As in all civil litigation, [the plaintiffs will obtain] the information they wish to disseminate only by virtue of the court's discovery processes." *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20, 32, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984). In Connecticut, the rules authorizing such discovery are adopted by the legislature; see General Statutes §§ 52-148 to 52-159; and by the judiciary. Practice Book § 216 et seq; see *State* v. *Clemente*, 166 Conn. 501, 512-516, 353 A.2d 723 (1974). "A litigant has no First Amendment right of access to information made available only for purposes of trying his suit.... Thus, continued court control over the discovered information does not raise the same specter of government censorship that such control might suggest in other situations." *Seattle Times Co.* v. *Rhinehart*, supra.

"Moreover, pretrial depositions and interrogatories are not public components of a civil trial. Such proceedings were not open to the public at common law.... Much of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action. Therefore, restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information." (Footnote omitted.) *Seattle Times Co.* v. *Rhinehart*, supra, 467 U.S. 33.

"Finally, it is significant to note that an order prohibiting dissemination of discovered information before trial is not the kind of classic prior restraint that requires exacting First Amendment scrutiny.... In sum, judicial limitations on a party's ability to disseminate information discovered in advance of trial implicates the First Amendment rights of the

restricted party to a far lesser extent than would restraints on dissemination of information in a different context." *Seattle Times Co.* v. *Rhinehart*, supra, 467 U.S. 33-34.

"Because of the liberality of pretrial discovery permitted by ... [Practice Book § 216 et seq.], it is necessary for the trial court to have authority to issue protective orders conferred by ... [Practice Book § 221]. It is clear from experience that pretrial discovery by depositions and interrogatories has a significant potential for abuse. This abuse is not limited to matters of delay and expense; discovery also may seriously implicate privacy interests of litigants and third parties.... There is an opportunity, therefore, for litigants to obtain-incidentally or purposefully-information that not only is irrelevant but if publicly released could be damaging to reputation and privacy. The government clearly has a substantial interest in preventing this sort of abuse of its processes.... The prevention of the abuse that can attend the coerced production of information under a State's discovery rule is sufficient justification for the authorization of protective orders." (Footnotes omitted.) *Seattle Times Co.* v. *Rhinehart*, supra, 467 U.S. 34-36. "[T]herefore ... where ... a protective order is entered on a showing of good cause as required by ... [Practice Book § 221], is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment." *Id.*, 37.

The defendants have advanced two principal grounds which, they claim, rise to the level of good cause for the issuance of a protective order. The first ground is that such an order is necessary to protect

the reputation of the defendants, especially the Diocese, and persons affiliated with them. The Diocese claims that its ability to obtain young people as volunteers in its religious ceremonies and its ability to perform good works has already been hampered by the publicity surrounding this case and that such damage will continue unless the requested protective order issues. Having heard the evidence, the court is not persuaded that disclosure of the products of pretrial discovery will visit such serious permanent damage on the defendants which, alone, would warrant, a protective order. In so holding, however, this court recognizes that at least one other court has held otherwise in an analogous situation; *Shenandoah Publishing House, Inc.* v. *Fanning*, 368 S.E.2d 253, 257-58 (Va. 1988); and that the Second Circuit Court of Appeals has observed that "[p]rotective orders are useful to prevent discovery from being used as a club by threatening disclosure of matters which will never be used at trial. Discovery involves the use of compulsory process to facilitate orderly preparation for trial, not to educate or titilate the public." *Joy* v. *North*, 692 F.2d 880, 893 (2d Cir. 1982).

The second principal ground asserted by the defendants for a protective order is that such an order is necessary to protect the right and opportunity of each of the defendants to obtain a fair trial by jury. The evidence was that this case, and the plaintiff's allegations, have received significant and responsible media coverage. Yet, the media coverage which those allegations have received may pale in comparison to the exposure which the products of pretrial discovery would yield. Not inappropriately, much of that information would be republished or rebroadcast by the media prior to

trial. Such exposure may well have a salutary effect, as the plaintiff claims, but that is not the purpose of pretrial discovery. *Joy* v. *North*, supra, 692 F.2d 893. Such pretrial media exposure of a case such as this indeed could impair the rights of the parties to receive a fair trial. *State* v. *Crafts*, 226 Conn. 237, 257-59, 627 A.2d 877 (1993); *State* v. *Townsend*, 211 Conn. 215, 225-26, 558 A.2d 669 (1989). It is, after all, the business of the Superior Court to provide private litigants an opportunity to adjust their grievances on their merits in a fair trial culminating in a final judgment. *Killingly* v. *Connecticut Siting Council*, 220 Conn. 516, 532, 600 A.2d 752 (1991); *Corey* v. *Avco-Lycoming Division*, 163 Conn. 309, 316-17, 307 A.2d 155 (1972), cert. denied, 409 U.S. 1116, 93 S.Ct. 903, 34 L.Ed.2d 699 (1972). A fair and impartial jury obtained from a fair cross section of the community, is an indispensable component of a fair jury trial. *State* v. *Castonguay*, 194 Conn. 416, 420, 481 A.2d 56 (1985); *State* v. *Townsend*, 167 Conn. 539, 551, 356 A.2d 12, cert. denied, 423 U.S. 846, 96 S.Ct. 84, 46 L.Ed.2d 62 (1975); see Conn. Constit., art. I, § 19; see also *J.E.B.* v. *Alabama ex rel. T.B.*, 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994); *Georgia* v. *McCollum*, 505 U.S. 42, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992); *Edmondson* v. *Leesville Concrete Co.*, 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991); *Powers* v. *Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991); *Martins* v. *Connecticut Light & Power Co.*, 35 Conn.App. 212, 222-226, 645 A.2d 557, cert. denied, 231 Conn. 915, 648 A.2d 154 (1994). We should aspire to achieve as impartial a jury from as broad a cross-section of the community for the fairest trial possible. Where, as here, prophylactic measures may be timely

employed, settling for the minimum in fairness ought not to be the goal of any court.

"Even if the pending litigation is a matter of public interest rather than an ordinary dispute between private litigants," Practice Book § 221 provides that a protective order may be issued "for good cause shown"; a higher standard, such as compelling cause, need not be satisfied. *Bowlen* v. *District Court*, 733 P.2d 1179, 1183 (Colo. 1987). "A finding of good cause must be based on a particular factual demonstration of potential harm, not on conclusory statements." (Authorities omitted.) *Anderson* v. *Cryovac, Inc.*, 805 F.2d 1, 7-8 (1st Cir. 1986).

Specific evidence of widespread media coverage was presented to the court. This court also takes judicial notice of media coverage of this case after the close of the evidence and at the end of the hearing, albeit not for the truth of the matters asserted therein. *Anderson* v. *Cryovac*, Inc., supra, 805 F.2d 8; *State* v. *Boucher*, 207 Conn. 612, 615-616, 541 A.2d 865 (1988). The parties' right to a fair and impartial jury comprised of a fair cross section of the community, already problematical because of the classic collision between that right and the right, and necessity, for a free and open press, will become further imperiled unless that right is protected by an appropriate order of the court. For this good cause, and because edification of the public is not a proper purpose of pretrial discovery; *Joy* v. *North*, supra, 692 F.2d 893; the motion of defendants Diocese and Bishop Curtis for a protective order is granted, pursuant to Practice Book § 221 and *Seattle Times Co.* v. *Rhinehart*, supra, until further order of the court and with the caveat that it shall "not restrict

the dissemination of the information if gained from other sources...." *Seattle Times Co.* v. *Rhinehart*, supra, 37. The text of that protective order is an addendum hereto.

In summary, the parties shall be permitted access to certain of the contents of the defendant Pcolka's personnel file, which has been examined by the court in camera, and the defendants' motions for a protective order with respect to personnel files other than that of Pcolka and with respect to the disclosure of information and documents obtained by way of pretrial discovery from any of the defendants or from Bishop Eagan are granted.

ADDENDUM

PROTECTIVE ORDER

1. Until further order of the court, which order shall be made not later than the completion of jury selection, all information, documents and transcripts which the parties may obtain through the depositions of the defendants, including persons designated pursuant to Practice Book § 244(g),[6] and

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[6] Practice Book § 244(g) provides: "A party may in the notice [of deposition] and in his subpoena name as the deponent a public or private corporation or a partnership or an association or a governmental agency or a state officer in an action arising out of the officer's performance of employment and designate with reasonable particularity the matters on which examination is requested. The organization or state officer so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated shall testify as to matters known or reasonably available to the organization. This paragraph does not preclude the taking of a deposition by any other procedure authorized by the Practice Book."

Bishop Edward Eagan shall not be disseminated, shown, disclosed, divulged or transmitted by any one to any person or organization other than the parties to this lawsuit and their respective attorneys and to any investigators and potential expert witnesses retained by the parties to this lawsuit or their attorneys and stenographic personnel with a need and obligation to see and receive the same, PROVIDED, that no such information or document shall be disseminated, shown, disclosed, divulged or transmitted to any person whatsoever, other than to the parties and their attorneys, unless and until such other person first is shown a copy of this protective order, reads it, agrees to be bound by its terms and to the terms of any order supplementing this order, and signifies his or her agreement by signing both pages of this order.

2. All such documents and transcripts which the attorneys representing any of the parties believe in good faith may be entitled to protection from disclosure after the completion of jury selection, shall be marked "CONFIDENTIAL: SUBJECT TO COURT ORDER" and shall be submitted to the court for review and appropriate order before being released from the protection afforded by this order.

3. Whenever any pleading, document or motion referencing, incorporating or attaching any documents described in paragraph one of this order is filed with the court or delivered to any judge thereof, it shall be filed or delivered under seal pending review by the court or judge and shall be marked by the party filing or delivering same "CONFIDENTIAL: SUBJECT TO COURT ORDER."

APPENDIX D
Excerpts From Opinion of the Supreme Court of Connecticut (Nov. 15, 2005)

Supreme Court of Connecticut.

George L. ROSADO et al., Plaintiffs-Appellants,

v.

BRIDGEPORT ROMAN CATHOLIC DIOCESAN CORPORATION et al., Defendants-Appellees.

Nos. 17059, 17060.

Nov. 15, 2005.

SULLIVAN, Chief Justice, and PALMER, VERTEFEUILLE, ZARELLA and LICARI, Justices.

PALMER, Justice.

Under General Statutes § 52-212a, a civil judgment or decree may not be opened or set aside more than four months after it has been rendered unless the trial court has continuing jurisdiction over the case in which the judgment or decree has been rendered. This certified appeal presents an important issue of first impression, namely, whether under § 52-212a, a trial court has continuing jurisdiction to vacate a protective order, upon motion of a third party, pertaining to documents in the court's possession that relate to a case that has been withdrawn more than four months prior to the filing of the motion to vacate the protective order. We conclude that a trial court has continuing jurisdiction

in such circumstances. Because the Appellate Court reached a contrary conclusion; see *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, 77 Conn. App. 690, 723-24, 825 A.2d 153 (2003); we reverse its judgment.

* * *

We conclude, therefore, that, just as a court has continuing jurisdiction to vacate or to modify an injunction after the four month limitation period of § 52-212a has expired, so, too, does a court have continuing jurisdiction to vacate or to modify a protective order after the expiration of that limitation period.

This conclusion is consistent with, if not mandated by, two important and well established principles. First, courts retain supervisory authority over documents in their possession. E.g., *Nixon* v. *Warner Communications, Inc.*, 435 U.S. 589, 598, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978). Second, the public has a presumptive right of access to court proceedings and documents. E.g., *United States* v. *Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995); see also *Doe* v. *Connecticut Bar Examining Committee*, 263 Conn. 39, 65 n. 16, 818 A.2d 14 (2003). With respect to a court's supervisory authority over documents in its custody and control, that power is not forfeited merely because the parties have agreed to a settlement and withdrawal of the case. As the Second Circuit Court of Appeals recently has observed, "[t]he court's supervisory power [over documents in its possession] does not disappear because jurisdiction over the relevant controversy has been lost. The records and files are not in limbo. [As] long as they remain under the aegis of the court, they are superintended by the judges who have

dominion over the court." *Gambale* v. *Deutsche Bank AG*, supra, 377 F.3d at 141.

This supervisory role of the court in relation to its own files is an especially important one insofar as it pertains to files that contain judicial documents-that is, documents that have been submitted to the court for its review in the discharge of the court's adjudicatory function-because "[t]he public has a common law presumptive right of access to [such] documents[53] ... and likely a constitutional one as well."[54] (Citation omitted.) *Id.*, at 140; see also

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[53] With respect to this right of access, it has been aptly stated that "[t]he public's exercise of its common law access right in civil cases promotes public confidence in the judicial system .... As with other branches of government, the bright light cast upon the judicial process by public observation diminishes the possibilities for injustice, incompetence, perjury, and fraud. Furthermore, the very openness of the process should provide the public with a more complete understanding of the judicial system and a better perception of its fairness." (Citation omitted.) *Littlejohn* v. *Bic Corp.*, 851 F.2d 673, 678 (3d Cir. 1988); accord *United States* v. *Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995).

[54] As to the issue of what documents are judicial documents, we agree generally that "the mere filing of a paper or document with the court is insufficient to render that paper a judicial document subject to the right of public access.... [T]he item filed must be relevant to the performance of the judicial function and useful in the judicial process in order for it to be designated a judicial document." *United States* v. *Amodeo*, supra, 44 F.3d at 145. Whatever the precise parameters of that category of documents may be, however, we also agree that "the presumptive right to 'public observation' is at its apogee when asserted with respect to documents relating to 'matters that directly affect an adjudication.'" *Gambale* v. *Deutsche Bank AG*, supra, 377 F.3d at 140, quoting *United States* v. *Amodeo*, 71 F.3d 1044, 1049 (2d Cir. 1995).

Jessup v. *Luther*, 277 F.3d 926, 927-28 (7th Cir. 2002) ("The general rule is that the record of a judicial proceeding is public.... Not only do such records often concern issues in which the public has an interest, in which event concealing the records disserves the values protected by the free-speech and free-press clauses of the First Amendment, but also the public cannot monitor judicial performance adequately if the records of judicial proceedings are secret." [Citations omitted.]). Although that presumptive right of access is not absolute and, therefore, may yield upon demonstration of a compelling reason for secrecy; e.g., *Gambale* v. *Deutsche Bank AG*, supra, 377 F.3d at 140; *Jessup* v. *Luther*, supra, 277 F.3d at 928; parties to litigation nevertheless "cannot expunge the public interest by the simple expedient of filing a [withdrawal of action] with the court. The public's stake in the propriety and particulars of the court's adjudication does not evaporate upon the parties' subsequent decision to settle."[55] *Gambale* v. *Deutsche Bank AG*, supra, at 140. Indeed, our review of the sealed documents at issue in the present case reveals that many of those documents are judicial documents.

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[55] The public's presumptive right of access to court proceedings and documents is embodied in our rules of practice. "Practice Book § 11-20 provides, in general terms, that the public may not be excluded from judicial proceedings, and that records of court proceedings may not be sealed, unless the court identifies, on the record and in open court, 'an interest which is determined to override the public's interest in attending such proceeding or in viewing such materials.' " *Doe* v. *Connecticut Bar Examining Committee*, supra, 263 Conn. at 67-68, 818 A.2d 14.

Gambale, a case that is strikingly similar to the present case in all material respects, provides persuasive support for the conclusion that a court possesses inherent power to modify a protective order concerning documents in its possession even though it otherwise may lack the authority to adjudicate the substantive rights of the parties to the case in which the protective order was issued. In *Gambale*, the plaintiff, Virginia Gambale, a former managing director employed by the defendant, Deutsche Bank AG (bank), brought an action against the bank alleging that it had discriminated against her on the basis of her sex and had retaliated against her for complaining about it. *Id.*, at 135. After pretrial discovery, the bank filed a motion for summary judgment. See *id.* Gambale's response to the bank's motion included certain documents that she filed with the District Court under seal in accordance with a protective order that the court previously had entered. *Id.* Thereafter, the District Court granted the bank's motion for summary judgment as to one of Gambale's claims, but denied the motion as to a number of other claims. *Id.*, at 136.

Shortly thereafter, the parties advised the District Court that they had settled the action on a confidential basis. *Id.* The District Court indicated that it disagreed with the parties regarding the propriety of keeping the settlement agreement confidential. *Id.* Approximately three weeks after they had advised the District Court that they had settled, the parties filed a stipulation of dismissal with prejudice as permitted by the federal rules of civil procedure. *Id.*, at 137; see Fed.R.Civ.P. 41(a)(1)(ii). The bank also sent the District Court a letter asserting that, as a result of the stipulated

dismissal of the action, the court no longer had jurisdiction over the case and, therefore, had no authority to permit disclosure of the settlement terms or to unseal any documents related to the action or the settlement. *Gambale* v. *Deutsche Bank AG*, supra, 377 F.3d at 137.

The District Court, however, issued an order unsealing the sealed documents that Gambale had filed in opposition to the bank's motion for summary judgment.[56] The District Court explained that, despite the parties' settlement and stipulation of dismissal, the court continued to have jurisdiction over the judicial documents filed with the court in connection with the litigation. *Id.* The District Court further noted that the bank had failed to demonstrate that its privacy interests in those documents overcame the presumption of access to those documents. *Id.*, at 138. The bank appealed from the District Court's order unsealing the documents, claiming, inter alia, that the trial court had no jurisdiction to issue the unsealing order after the filing of the stipulation of dismissal. *Id.*, at 135.

Although the Second Circuit Court of Appeals acknowledged that the filing of a stipulation of dismissal generally "divests the court of its jurisdiction over a case, irrespective of whether the ... court approves the stipulation"; *id.*, at 139; it stated further that "[i]t simply does not follow ... that the filing of a stipulation of dismissal divests a court of jurisdiction either to dispose of material in its files as it thinks appropriate or to modify or vacate its own protective orders with respect to such documents."

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[56] The court issued the order sua sponte. *Gambale* v. *Deutsche Bank AG*, supra, 377 F.3d at 134, 138.

Id., at 139-40. After underscoring the public's presumptive right of access to judicial documents, the District Court's supervisory authority over documents and files in its possession and that court's inherent power to modify or to terminate protective orders at any time, the Court of Appeals held that a District Court "acts within its jurisdiction when it modifies or vacates a protective order to allow [a public right of access to judicial documents], irrespective of whether it does so before or after a stipulation of dismissal has been filed." *Id.*, at 142. The Court of Appeals concluded that the District Court "acted within its jurisdiction when it issued the [u]nsealing [o]rder even though the order followed the parties' filing of the [s]tipulation of [d]ismissal."[57] *Id.*

We fully agree with the reasoning and conclusion of the Court of Appeals in *Gambale*.[58] As in *Gambale*, the trial court in the present case had inherent power to vacate or to modify the protective orders in the withdrawn cases-even though we may presume that, by operation of § 52-212a, the court otherwise had been divested of its authority to affect the substantive rights of the parties to those cases-as

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[57] The court in *Gambale* also concluded, inter alia, that the District Court properly had unsealed the documents in its possession because the bank had failed to demonstrate a privacy interest in those documents that was sufficiently compelling to overcome the presumption of access to those documents. See *Gambale* v. *Deutsche Bank AG*, supra, 377 F.3d at 142.

[58] We note that the Court of Appeals' opinion in *Gambale* was issued after the Appellate Court issued its opinion in the present case and, therefore, the Appellate Court did not have the benefit of it.

long as those protective orders remained in effect. To conclude otherwise would require us to ignore both the court's inherent common-law authority to vacate or to modify its own equitable orders and the acknowledged public interest in documents filed with the court in connection with its adjudicatory function.

* * *

In this opinion VERTEFEUILLE and LICARI, Justices, concurred.

SULLIVAN, Chief Justice, with whom ZARELLA, Justice, joins, dissenting.

The majority concludes that the Appellate Court properly treated the trial court's actions as the effective equivalent of allowing the New York Times Company (Times), the Globe Newspaper Company, Inc., the Washington Post Company and the Hartford Courant Company (collectively, newspapers), to intervene in the withdrawn cases[1] and restoring the cases to the docket. I would conclude that the trial court's action is more properly characterized as the effective equivalent of docketing the newspapers' motions for the limited purpose of determining whether the court had jurisdiction to restore the cases to the docket. Accordingly, I believe that the cases should be remanded to the trial court for a determination as to whether the newspapers should be allowed to intervene and whether the cases should be restored to the docket. I also believe that, in making that determination, the court must consider whether the parties in the withdrawn

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[1] See footnote 3 of the majority opinion.

matters relied on the permanence of the protective orders. If they did, the court should not grant the motions to intervene absent a showing of extraordinary circumstances or compelling need. Accordingly, I dissent.

* * *

I also note that, in the present case, it is a mere fortuity that the parties had not retrieved and the court had not destroyed the documents before the newspapers sought to intervene. In my view, that fact should weigh against allowing intervention. If it is acceptable as a policy matter for parties to retrieve documents from the court and for the court to destroy documents at a certain point, then the same policy interests-presumably those favoring stability and finality in the disposition of cases-should militate against restoring the matter to the docket. The mere accident that the documents are still in the court's custody in the present case is not a reason for treating the case differently from a case in which the parties and the court diligently fulfilled their obligations with respect to the documents.

In any event, even if it is assumed that the court effectively restored the cases to the docket, I would reverse that ruling because the trial court never applied the proper standard. I believe that the trial court was required to consider whether the parties in the withdrawn cases had settled the cases in reliance on the permanence of the protective orders.[7] If so,

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[7] The Diocese represents in its brief that "[i]n settling these actions, the Diocese relied upon the existence of the [protective] orders and the confidentiality that they ensured.... The Diocese also relied upon the expectation that the materials filed under seal would continue to be treated as such.... In deciding to settle, an essential factor was the expectation and belief by the

the court should not have granted the motions to intervene absent a showing of some extraordinary circumstance or compelling need. The general rule is that intervention after an action has been terminated is highly disfavored and will be granted only in extraordinary cases.[8] Several courts have

Diocese that the sealed materials in the court files would remain sealed, and that the discovery documents were and would remain confidential."

[8] See *United States* v. *Associated Milk Producers, Inc.*, 534 F.2d 113, 116 (8th Cir.) ("[t]he general rule is that motions for intervention made *after* entry of final judgment will be granted only upon a strong showing of entitlement and of justification for failure to request intervention sooner" [emphasis in original]), cert. denied sub nom. *National Farmers' Organization, Inc.* v. *United States*, 429 U.S. 940, 97 S.Ct. 355, 50 L.Ed.2d 309 (1976); *Crown Financial Corp.* v. *Winthrop Lawrence Corp.*, 531 F.2d 76, 77 (2d Cir. 1976) (intervention after judgment is unusual and not often granted); *Black* v. *Central Motor Lines, Inc.*, 500 F.2d 407, 408 (4th Cir. 1974) ("[i]ntervention is ancillary and subordinate to a main cause and whenever an action is terminated, for whatever reason, there no longer remains an action in which there can be intervention"); *Abdul-Raheem* v. *Orr*, 672 F.Supp. 1389, 1391 (W.D.Okla. 1986) (when action is terminated, for whatever reason, there no longer remains action in which to intervene); *Mundt* v. *Northwest Explorations, Inc.*, 947 P.2d 827, 830 (Alaska 1997) (motions to intervene made after conclusion of litigation normally are not timely absent showing of justification); *In re One Cessna 206 Aircraft*, 118 Ariz. 399, 402, 577 P.2d 250 (1978), quoting *United States* v. *Associated Milk Producers, Inc.*, supra, at 116; *State Employees' Credit Union, Inc.* v. *Gentry*, 75 N.C.App. 260, 264, 330 S.E.2d 645 (1985) (motions to intervene made after judgment has been rendered are disfavored and are granted only after finding of extraordinary and unusual circumstances or upon strong showing of entitlement and justification); *Marteg Corp.* v. *Zoning Board of Review*, 425 A.2d 1240, 1243 (R.I. 1981) (because of potential of prejudice to parties, person seeking to intervene after judgment has especially heavy burden).

recognized an exception to this rule when intervention is sought for the purpose of modifying a protective order entered in the terminated action. See, e.g., *Pansy* v. *Borough of Stroudsburg*, 23 F.3d 772, 778-79 (3d Cir. 1994) (court does not follow rule prohibiting intervention in terminated action where intervention is sought for purpose of modifying protective order). The rationale for this exception is that, because "the desired intervention relates to an ancillary issue and will not disrupt the resolution of the underlying merits, untimely intervention is much less likely to prejudice the parties." (Internal quotation marks omitted.) *Id.*, at 779, quoting *Public Citizen* v. *Liggett Group, Inc.*, 858 F.2d 775, 786 (1st Cir. 1988), cert. denied, 488 U.S. 1030, 109 S.Ct. 838, 102 L.Ed.2d 970 (1989); see also *Equal Employment Opportunity Commission* v. *National Children's Center, Inc.*, 146 F.3d 1042, 1047 (D.C. Cir. 1998) ("timeliness requirement is to prevent prejudice in the adjudication of the rights of the existing parties, a concern not present when the existing parties have settled their dispute and intervention is for a collateral purpose" [internal quotation marks omitted]); *Mokhiber* v. *Davis*, 537 A.2d 1100, 1105 (D.C. App. 1988) ("access to court records does not involve relitigation of the underlying dispute, so the rationale behind requiring extraordinary circumstances for postjudgment intervention does not as a rule apply to access claims").

Because the sole rationale for allowing intervention in a terminated action, when intervention is sought for the purpose of modifying a protective order, is that such intervention will not

affect the settled expectations of the parties,[9] I believe that the court must determine whether the parties relied on the permanence of the protective orders in settling the cases before allowing intervention. If the court determines that reliance on the permanence of the protective orders was an integral part of the settlement or disposition of the case, I believe that the court should not grant the motions to intervene absent a showing of an extraordinary circumstance or compelling need. Cf. *Securities & Exchange Commission* v. *TheStreet.com*, 273 F.3d 222, 229 (2d Cir. 2001) (when parties have

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[9] My research has revealed no cases in which the court has found an exception to the rule prohibiting intervention in a closed case merely because the remedy granted in the case was injunctive in nature. Cf. *Garrity* v. *Gallen*, 697 F.2d 452, 455-56 (1st Cir. 1983) (denying postjudgment motion to intervene in case in which court granted injunctive relief as, inter alia, untimely); *Vonage Holdings Corp.* v. *Minnesota Public Utilities Commission*, United States District Court, Docket No. 03-5287, 2004 WL 114983 (D.Minn. January 14, 2004) (same). Thus, I believe that the majority's reliance on the rule enunciated in *AvalonBay Communities, Inc.* v. *Plan & Zoning Commission*, supra, 260 Conn. at 246, 796 A.2d 1164, that courts always have jurisdiction to effectuate their judgments, and the corollary rule that courts always have jurisdiction to modify injunctions, is misplaced. The rationale for allowing postjudgment intervention for the purpose of modifying a protective order is not that doing so will vindicate the judgment, but that doing so will not affect the rights of the parties as bargained for or adjudicated before the case was terminated. Conversely, when granting the intervention will undermine the settlement or judgment, it must be denied except in an extraordinary case. Accordingly, I believe that the principle underlying *AvalonBay Communities, Inc.*, that the integrity of judgments should be protected, acts to limit the court's power to grant postjudgment intervention for the purpose of modifying a protective order.

relied on protective order, court should not modify order "absent a showing of improvidence in the grant of [the] order or some extraordinary circumstance or compelling need" [internal quotation marks omitted]), quoting *Martindell* v. *International Telephone & Telegraph Corp.*, 594 F.2d 291, 296 (2d Cir. 1979);[10] see also *In re Agent Orange Product Liability Litigation*, 821 F.2d 139, 147 (2d Cir.) (when parties have relied on permanence of protective order, "it can only be modified if an extraordinary circumstance or compelling need warrants the requested modification" [internal quotation marks omitted]), cert. denied sub nom. *Dow Chemical Co.* v. *Ryan*, 484 U.S. 953, 108 S.Ct. 344, 98 L.Ed.2d 370 (1987); *Federal Deposit Ins. Corp.* v. *Ernst & Ernst*, 677 F.2d 230, 232 (2d Cir. 1982) (same).[11] Accordingly, I would remand the case

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[10] In *Securities & Exchange Commission* v. *TheStreet.com*, supra, 273 F.3d at 224-25, the intervening plaintiff sought to intervene prior to judgment for the purpose of modifying a protective order. The District Court granted the motion to intervene and unsealed certain documents. *Id.*, at 227. On appeal to the United States Court of Appeals for the Second Circuit, the defendant did not challenge the intervention, but only the modification of the protective order. *Id.*, at 228. The court noted that modification should not be granted absent compelling need or extraordinary circumstances when the protective order has been relied upon. *Id.*, at 229. In my view, when intervention is sought after judgment, the principle cited by the Second Circuit Court of Appeals should bar not only modification, but also intervention.

[11] In *Mokhiber* v. *Davis*, supra, 537 A.2d at 1105-1106, the court concluded that, when secrecy is integral to settlement, the potential for inequity should affect the court's evaluation of the merits of the motion to modify a protective order, not the right to intervene. As I have indicated, however, the rationale for allowing intervention after judgment in such cases is that it is

to the Appellate Court with instruction to remand the case to the trial court to determine whether the cases should be restored to the docket. I believe that the court, in making that determination, should consider whether the parties relied on the permanence of the protective orders in reaching settlement and, if so, whether there are extraordinary circumstances or compelling needs warranting intervention.

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not inequitable to do so when it would not affect the litigated rights of the parties. Therefore, I believe that this is a threshold issue that must be resolved before the court considers the merits of the motion for modification.

APPENDIX E

Excerpts from Opinion of the Superior Court of Connecticut, Judicial District of Fairfield (June 17, 1998)

Superior Court of Connecticut, Judicial District of Fairfield.

George L. ROSADO, et al., Plaintiffs,

v.

BRIDGEPORT ROMAN CATHOLIC DIOCESAN CORPORATION, et al., Defendants.

No. CV93302072.

June 17, 1998.

SKOLNICK, Judge.

* * *

The named defendant filed a renewed motion for summary judgment with respect to the negligence claims on November 6, 1997, arguing that the first amendment to the United States constitution prohibits the court from adjudicating the adequacy of the defendants' internal administrative and disciplinary policies. The plaintiffs have filed an objection, arguing that the first amendment does not bar the remaining negligence claims. The matter was heard by the court on May 4, 1998.

II. DISCUSSION

* * *

A. Applicable Law

"The Free Exercise Clause of the First Amendment, which has been applied to the States through the Fourteenth Amendment ... provides that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof....' " (Citation omitted.) *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U.S. 520, 531, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993). "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Id.*, at 532, 113 S.Ct. 2217.

"The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause." *Id.*, at 543, 113 S.Ct. 2217. Several courts have determined, however, that a claim of institutional negligence does not require any inquiry into religious doctrine or practice. "Instead, review only requires the court to determine if the Church Defendants knew of [the minister's] inappropriate conduct, yet failed to protect third parties front him. The court is simply applying secular standards to secular conduct which is permissible under First Amendment standards." *Konkle* v. *Henson*, 672 N.E.2d 450, 456 (Ind.App. 1996). "The common law doctrine of negligence does not intrude upon the free exercise of religion, as it does not 'discriminate against [a] religious belief or regulate or prohibit conduct because it is undertaken for religious reasons.' ... The court's determination of an action against the

defendants based upon their alleged negligent supervision of [Pcolka] would not prejudice or impose upon any of the religious tenets or practices of Catholicism. Rather, such a determination would involve an examination of the defendants' possible role in allowing one of its employees to engage in conduct which they, as employers, as well as society in general expressly prohibit." (Citation omitted.) *Nutt* v. *Norwich Roman Catholic Diocese*, 921 F.Supp. 66, 74 (D.Conn.1995). "Application of a secular standard to secular conduct that is tortious is not prohibited by the Constitution." *Moses* v. *Diocese of Colorado*, 863 P.2d 310, 320 (Colo. 1993), cert. denied, 511 U.S. 1137, 114 S.Ct. 2153, 128 L.Ed.2d 880 (1994).[5] See also *Smith* v. *Privette*, 128 N.C.App. 490, 495 S.E.2d 395, 398 (1998) (claims against church not precluded by first amendment where issue is whether church knew or has reason to know of employee's propensity to engage in sexual misconduct, conduct that church does not claim is part of its tenets or practices).

---

[5] Some courts, however, have determined that "[a]djudicating the reasonableness of a church's supervision of a cleric-what the church 'should know'-requires inquiry into religious doctrine." *Gibson* v. *Brewer*, 952 S.W.2d 239, 247 (Mo. 1997). See also *Swanson* v. *Roman Catholic Bishop*, 692 A.2d 441, 445 (Me. 1997) (imposing secular duty of supervision on church and enforcing that duty through civil liability would restrict church's freedom to interact with its clergy in manner deemed proper by ecclesiastical authorities); *L.L.N.* v. *Clauder*, 209 Wis.2d 674, 690, 563 N.W.2d 434 (1997) (due to strong belief in redemption, bishop may determine that wayward priest can be sufficiently reprimanded through counseling and prayer, and if court is asked to review such conduct to determine whether bishop should have taken some other action, court would directly entangle itself in religious doctrines).

It is apparent to the court, that in determining whether the defendants were negligent in the supervision of Pcolka, it would be able to apply neutral principles of tort law to determine whether the defendants failed to act when they knew or should have known of Pcolka's engaging in the alleged tortious conduct. "[T]here is no indication that, by taking the kind of preventative action required by tort law, the [institutional] defendants would have violated any 'doctrine practice or law' of the Roman Catholic Church. In the absence of such a conflict, subjecting the [institutional] defendants to potential tort liability does not violate their right to the free exercise of their religion." *Smith* v. *O'Connell*, 986 F.Supp. 73, 79 (D.R.I. 1997). Further, the court is confident that this would not prejudice or impose upon the religious beliefs or practices of the Catholic faith.

In addition, the court will be able to apply neutral principles of tort law to conduct that is expressly prohibited by the laws of this state. "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Employment Division, Dept. of Human Resources of Oregon* v. *Smith*, 494 U.S. 872, 878-79, 110 S.Ct. 1595, 108 L.Ed.2d 876, reh. denied, 496 U.S. 913, 110 S.Ct. 2605, 110 L.Ed.2d 285 (1990). "The First Amendment does not provide an absolute freedom to act with regard to religious beliefs.... Instead, that freedom can be regulated for the protection of society.... The protection of society requires that religious organizations be held accountable for injuries they cause to third persons." (Citations omitted.) *Konkle* v. *Henson*, supra, 672 N.E.2d at 456. "To hold otherwise would

impermissibly place a religious leader in a preferred position in our society." *Sanders* v. *Casa View Baptist Church*, 134 F.3d 331, 336 (5th Cir. 1998). See also *Kenneth R.* v. *Roman Catholic Diocese*, 229 App.Div.2d 159, 165, 654 N.Y.S.2d 791 (1997) (religious entities have some duty to prevent injuries caused by persons in their employ whom they have reason to believe will engage in injurious conduct); *Jones By Jones* v. *Trane*, 153 Misc.2d 822, 829, 591 N.Y.S.2d 927 (1992) (court would not dismiss negligence claims where misconduct charged is sexual abuse of infant). In dicta, a Florida appellate court stated that "the Academy of Florida Trial Lawyers makes a convincing case that the First Amendment does not protect the church when the acts of the clergy involve children and are criminal in nature .... [J]ust as the State may prevent a church from offering human sacrifices, it may protect its children against injuries caused by pedophiles by authorizing civil damages against a church that knowingly (including should know) creates a situation in which such injuries are likely to occur." *Doe* v. *Dorsey*, 683 So.2d 614, 617 (Fla.Dist.Ct.App. 1996). "Since the Supreme Court has consistently failed to allow the Free Exercise Clause to relieve [an] individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs, the defendants can not appropriately implicate the First Amendment as a defense to their alleged negligent conduct." (Internal quotation marks omitted.) *Nutt* v. *Norwich Roman Catholic Diocese*, supra, 921 F.Supp. at 74. "The Free Exercise Clause might well prohibit this court from interfering in the manner in which the Diocese supervised a priest's performance of Mass, or confession, but it certainly cannot prohibit this court,

from determining whether the Diocese should be liable for negligently allowing its employees to engage in criminal conduct." *Reed* v. *Zizka*, Superior Court, judicial district of Hartford-New Britain at Hartford, Docket No. CV950555221S, 1998 WL 123050 (March 5, 1998, Aurigemma, J.); see also *Reynolds* v. *Zizka*, Superior Court, judicial district of Hartford-New Britain at Hartford, Docket No. CV950555222S, 1998 WL 123047 (March 5, 1998, Aurigemma, J.) (motion to strike on first amendment grounds denied, relying on *Nutt*).

* * *

III. CONCLUSION

The court finds that the free exercise of religion clause and the establishment clause of the first amendment to the federal constitution do not prevent a state from prohibiting criminal conduct on the part of clergy through laws not aimed at the promotion or restriction of religious beliefs. *Nutt* v. *Norwich Roman Catholic Diocese*, supra, 921 F.Sup. at 74. To rule otherwise would result in declaring the state and its inhabitants unable to seek redress when clergy are accused of endangering the welfare and safety of minors, regardless of state law in place to protect such minors from the very abuses alleged. This court believes that these plaintiffs' claims can be adjudicated by purely neutral secular principles or standards. The court concludes, therefore, that neither the establishment clause nor the free exercise clause preempt or prohibit this court from determining the negligent supervision claims against the defendants.

* * *

APPENDIX F
Order Denying Diocese's Motion For Reconsideration And For Reconsideration En Banc, (June 30, 2009)

SUPREME COURT

STATE OF CONNECTICUT

NO. SC 17807

GEORGE ROSADO

V

BRIDGEPORT ROMAN CATHOLIC DIOCESAN CORPORATION, ET AL. :JUNE 30, 2009

ORDER

THE MOTION OF THE DEFENDANTS-APPELLANTS, FILED JUNE 12, 2009, FOR RECONSIDERATION AND RECONSIDERATION EN BANC, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY ORDERED DENIED.

NORCOTT, ZARELLA, SCHALLER, JS ,DID NOT PARTICIPATE IN THE CONSIDERATION OR DECISION OF THE MOTION.

BY THE COURT,

L. JEANNE DULLEA
ASSISTANT CLERK-APPELLATE

NOTICE SENT: JUNE 30, 2009
DAY PITNEY, LLP
HALLORAN & SAGE, LLP
BINGHAM MCCUTCHEN, LLP
LOUGHLIN FITZGERALD, PC
HENRY LONG, III
RUBENS & LAZINGER
TREMONT & SHELDON, P.C.
HON. JON ALANDER
CLERK WATERBURY JUDICIAL DISTRICT
CV93-0157085S)

QUATRELLA & RIZZO, LLC
LASKE & BROWN, LLC
HINCKLEY, ALLEN & SNYDER, LLP
JONTHAN M ALBANO
PHILIP ALLEN LACOVARA MAYER, BROWN,
ROWE & MAW, LLP
REPORTER OF JUDICIAL DECISIONS
489/080505

APPENDIX G

Excerpts From Bridgeport Roman Catholic Diocesan Corporation's Opening Brief In The Connecticut Supreme Court (May 15, 2007)

* * *

[P.32-33]

III. THE DISCLOSURE OF THE DOCUMENTS WAS BARRED BY WELL-RECOGNIZED CONSTITUTIONAL, COMMON LAW AND STATUTORY PRIVILEGES AND RIGHTS

In ordering wholesale disclosure of all sealed material, Judge Alander failed to recognize the privileged nature of the documents. Those privileges were analyzed in detail in the 19 privilege logs, (R__; A1274-1329 (example of one log)), and the Diocese's memorandum of law. (A476-510) These privileges are absolute and may not be subject to any compromise or balancing.

* * *

B. Virtually All Documents Ordered Released Were Covered By Privilege

Three distinct types of constitutionally-protected communications are at issue: (1) confidential communications made to clergymen, including communications between priests of the Diocese and their clerical superiors seeking or obtaining counseling or spiritual guidance about their behavior; (2) documents prepared by Church officials evaluating particular priests for continued service in the ministry or determining their appropriate assignments within the Church; and (3) documents

reflecting the results of inquiries made by clerical superiors into facts that, in the judgment of the clerical superiors, may bear on the fitness of a particular priest for continued service in ministry or for a particular assignment within the Church. Extensive case law cited to Judge Alander, (A476-503), establishes that documents of these kinds are protected from compelled disclosure by the federal and Connecticut privileges. See also *Hollins* v. *Methodist Healthcare, Inc.*, 474 F.3d 223, 226 (6th Cir. 2007) (discussing "ministerial exception" under First Amendment, barring civil courts from re-examining clerical superior's determination of individual clergyman's fitness for particular ministry).

The compelled disclosure of such confidential, privileged communications and deliberations would violate the Religion Clauses of the Federal Constitution and their counterparts in Connecticut's Constitution. In the 19 privilege logs (A1274-1329) and the Diocese's memorandum of law (A476-503), the Diocese explained the application of these privileges under the Federal and Connecticut Constitutions, which bar the disclosure of these internal communications and deliberations. Judge Alander did not dispute the validity or existence of these general claims of privilege or undertake a document-by-document review to challenge the application of the privileges to any specific document. Instead, he declared that all privileges had been waived.

C. The Privileges Were Not Waived By Producing Materials Under A Protective Order

"Waiver is the intentional relinquishment of a known right. A waiver occurs, therefore, only if there is both knowledge of the existence of the right and intent to relinquish it." *Schreck* v. *Stamford*, 72 Conn. App. 497, 500 (2002). Because waiver must be made knowingly, voluntarily and intentionally, it is not to be lightly inferred. See *State* v. *Iverson*, 48 Conn. App. 168, 176 (1998) (waiver should be implied under only the most compelling circumstances).

The trial court held that the Diocese waived its right to assert any privileges or constitutional rights, because it produced the confidential materials during discovery. (A266-69) The Diocese, however, has consistently insisted that the discovery the plaintiffs were seeking involved highly confidential matters. In response to the Diocese's concerns about privilege and confidentiality, when the Diocese produced documents in 1994, Judge Levin promptly -- and properly -- placed the documents under protective orders sealing both the documents themselves and the ensuing depositions that probed similar matters. The court thus preserved their confidential and privileged status. Contrary to Judge Alander's holding, the Diocese's production of privileged documents under the protections of protective orders does not constitute a deliberate waiver of privilege as to any third party. Cf. *Crystal Grower's Corp.* v. *Dobbins*, 616 F.2d 458, 461-62 (10th Cir. 1980).

* * *

[P.36]

2. The Constitutional Privileges

The trial court held that the Diocese also forfeited its constitutional privileges simply because those documents were produced to the plaintiffs under a protective order. (A265-69) But a waiver or forfeiture of a constitutional right "not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady* v. *United States*, 397 U.S. 742, 748 (1970). See *United States* v. *Plitman*, 194 F.3d 59, 63 (2d Cir. 1999); *State* v. *Davis*, 13 Conn. App. 667, 675 (1988). Indeed, courts must "'indulge every reasonable presumption against waiver' of fundamental constitutional rights." *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999). "When First Amendment rights are at issue," federal constitutional law requires that "the evidence must be 'clear and compelling' that such rights were waived." *Hollins*, 474 F.3d at 226.

Contrary to the trial court's holding, the Diocese's right under the First Amendment to protect certain confidential information against compelled disclosure is not subject to waiver as a matter of law; waiver may be found only when there actually has been an intentional relinquishment of these constitutional rights. See *Tomic* v. *Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006). There was no evidence that would even support a finding of an intentional waiver by the Diocese or any of the defendants, let alone evidence that could overcome the strong presumption against the waiver of a constitutional right. Since the Diocese produced the privileged documents under

the terms and protection of Judge Levin's orders, and all of the material was promptly sealed against further dissemination, Judge Alander erred in concluding that that the Diocese "intentionally relinquished or abandoned a known right or privilege." *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938); *United States* v. *Nelson*, 277 F.3d 164, 219 (2d. Cir. 2002); *State* v. *Cobb*, 251 Conn. 285, 371 (1999) ("Relying on the standard articulated" in *Zerbst*). Any suggestion that one forfeits constitutional protections (or any other privileges) under the circumstances here would eviscerate crucial constitutional privileges.

This was a significant error, as the 19 privilege logs contained at least 18,085 assertions of the privilege under the First Amendment's Religious Clauses. (A1349-51)

* * *

APPENDIX H
Excerpts From Bridgeport Roman Catholic Diocesan Corporation's Reply Brief in the Supreme Court of Connecticut (Sept. 27, 2007)

* * *

[P. 22-27]

VI. THIS COURT SHOULD RECOGNIZE A DISCOVERY PRIVILEGE BASED ON THE FIRST AMENDMENT'S RELIGION CLAUSES

Judge Alander did not deny that many of the documents he was ordering disclosed fell within a federal First Amendment privilege for internal church consultations, deliberations, and evaluations. Instead, he relied solely on alleged "waiver" of these and other privileges. (A265-69) The Newspapers, however, citing *Roman Catholic Diocese of Jackson* v. *Morrison*, 905 So.2d 1213 (Miss. 2005) and *Roman Catholic Archbishop of Los Angeles* v. *Superior Court*, 131 Cal. App. 4th 417 (2005), claim that the "constitutional privileges" asserted by the Diocese have been "uniformly rejected" by other courts under "identical" circumstances. (Newspapers' Br. at 49-50) The Newspapers' claim is without merit.

A. The "Clergyman" Or "Priest-Penitent" Privilege Is An Absolute Privilege Grounded In The Religion Clauses Of The First Amendment

The Free Exercise and Establishment Clauses (the "Religion Clauses") of the First Amendment provide that "Congress shall make no law respecting

an establishment of religion, or prohibiting the free exercise thereof." For centuries, the Religion Clauses have been interpreted as strictly prohibiting governmental interference in matters of religion. They establish what is often called a "wall of separation" between church and state. The Establishment Clause prevents the state from unduly favoring any particular religion or all religions. The Free Exercise Clause protects religion and religious congregations from interference by the State in, among other things, matters of internal governance, organization, evaluation, and discipline.

The "clergyman" or "priest-penitent" privilege is not merely a matter of discretion left to individual States to grant or withhold as their legislatures or courts may deem desirable from time to time. Confidential communications to and from a clergyman in connection with seeking advice and counsel are an essential ingredient of the "free exercise of religion." Permitting a court – or any person – to intrude upon these sacrosanct communications would destroy the sacred communion necessary to minister to a penitent's spiritual well-being, thereby impermissibly inhibiting religious practice in violation of the protections afforded under the Religion Clauses. Therefore, the First Amendment itself imports to this privilege a constitutional status that requires virtually impenetrable deference.

B. Civil Courts Are Prohibited From Probing Or Evaluating Internal Communications Relating To Matters Of Church Doctrine, Governance Or Administration, And Such Internal Deliberations Should Be Privileged Against Compelled Disclosure

Pursuant to the Religion Clauses, internal church matters involving discipline, faith, internal organization, or ecclesiastical rule, custom or law of hierarchical religious organizations are immune from review or examination by civil courts. *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696, 708-17 (1976); *Ayon* v. *Gourley*, 47 F. Supp. 2d 1246, 1250 (D. Colo. 1998), aff'd, 85 F.3d 873 (10th Cir. 1999) (finding that "court examination and oversight of internal church policies would constitute an encroachment on the church's religious functions."). This constitutional immunity is rooted in the well-settled principle that the freedom to exercise religion and to be free from excessive entanglements with civil authorities must include the right to make ecclesiastical decisions free from interference by civil courts. See *Serbian Eastern Orthodox Diocese*, 426 U.S. at 713.

Accordingly, "civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom or law." *Id.* (emphasis added). See also *Hutchison* v. *Thomas*, 789 F.2d 392, 393 (6th Cir. 1986). Civil courts, therefore, have no role to play in reviewing or examining ecclesiastical decisions. See *Serbian Eastern Orthodox Diocese*, 426 U.S. at 712.

Under these principles, the Free Exercise Clause reserves exclusively for review and accountability within the church any determination whether a clerical superior such as a diocesan bishop makes a wise or unwise decision in evaluating a particular priest for ministry or assigning that priest to a particular ministry. Not only is there no "compelling governmental interest" in re-examining decisions of this sort, the First Amendment bans federal, state and local governments, including their courts, from indulging in such second-guessing.

The constitutional immunity from State inquiry and examination into internal church matters granted to hierarchical churches under the First Amendment necessarily encompasses an immunity from the coerced discovery of documents concerning such matters in judicial proceedings. Indeed, the Supreme Court has observed that the "very process of inquiry" into matters of ecclesiastical concern may impinge on rights guaranteed by the Religion Clauses. See *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 502 (1979).

Since the civil courts have no legitimate power under the Religion Clauses to undertake an inquiry into privileged communications relating to church discipline or administration, the civil courts should be equally prohibited from using their coercive power as an instrument of inquisition on behalf of strangers to those privileged communications (i.e., civil litigants or other third parties) by forcing a church to disclose these confidential internal communications. Therefore, the courts should not demand access to internal church documents that reflect these confidential deliberations or use the power of the

State to turn over such materials to third parties - such as the Newspapers.

Moreover, apart from lurid voyeurism, the Newspapers have not demonstrated a "compelling governmental interest" that would justify it invading the constitutionally privileged relationships identified by the Diocese - even if a "compelling governmental interest" could allow a court to ignore these privileges. Mere public curiosity about the contents of privileged documents cannot reflect a compelling interest sufficient to overcome a constitutional right. If it were, then the protections provided by the Constitution would be hollow, because it always would be possible to identify some desire on the part of some members of the public to peer behind the confessional screen, learn the secrets confided to a counselor, or second-guess the religious decisions of a hierarchal church. The fact that the Intervenors are members of the press does not change this constitutional calculus.

There is no "governmental" purpose in indulging the Newspapers' prurient curiosity. Such action by the Court would constitute a burden on the Diocese's exercise of religion in that it would cause a chilling effect on the Diocese's ability to administer, supervise and discipline its clergy as part of its internal affairs. Likewise, it would adversely impact the Diocese's ability to communicate openly with clergy in response to allegations and as part of internal investigations governed by Canon Law.

* * *

[P.29-30]

VIII. PRIVILEGES WERE NOT WAIVED BY PRODUCING MATERIALS UNDER A PROTECTIVE ORDER

As a matter of federal constitutional law, a federal privilege is waived only when the holder of the privilege "knowingly and voluntarily" chooses to relinquish the privilege. See *Brady* v. *United States*, 397 U.S. 742, 748 (1970). Contrary to the Newspapers' claim, (Newspapers' Br. at 47-50), the Diocese's production of material under a court protective order that expressly barred further dissemination and sealed the privileged material, did not constitute a "knowing and voluntary" abandonment of the right to keep the information from general public dissemination. The Newspapers cite no case holding that a waiver occurs in circumstances like these.

To the contrary, in *Roman Catholic Archbishop*, 131 Cal. App. 4th at 425, a decision cited by the Newspapers, the Archdiocese was allowed to assert claims of privileges under the Religion Clauses in connection with documents which, although not yet reviewed by a Grand Jury, had been "turned over" in response to its subpoena. See *Lugosch* v. *Pyramid Co.*, 435 F.3d 110, 125 (2d Cir. 2006) (remanding because plaintiff's possession of defendants' allegedly privileged documents did not automatically waive privilege).

* * *

APPENDIX I
Excerpts From Hearing On Newspapers' Motion To Unseal The Documents (August 10, 2006)

[Tr. 92-96]

THE COURT: There was no compulsion in this case to turn over particular documents by the Court, was there?

MR. JOHNSON: I believe – My understanding of the history of this case, every production was not -- no production was voluntary.

THE COURT: But Judge Levin's order was in response to a protective order that certain information not be publicly disclosed, not that -- It wasn't an issue about whether it could be otherwise compelled, was there?

MR. JOHNSON: My understanding of the history of the case, again, your Honor, is nothing was voluntarily produced. Everything was subject to restrictions of the protective order and the sealing process.

Also, if we look at the individual privileges, some of them are not for others to waive. I think if you look at the health care privileges, the personnel file privilege, the priest penitent privilege, even if there has been -- if we assume for the sake of argument that there has been some waiver in the past -

THE COURT: Let me ask about the priest penitent privilege. Is it the claim here that the discussions between an individual priest and his supervisor were subject to that privilege?

MR. JOHNSON: Yes, and instances where victims approached the church and had meetings with the church, those meeting were also subject to that privilege, your Honor.

THE COURT: Let me ask you about the former first. Is it your claim that those meetings were to obtain spiritual advice?

MR. JOHNSON: Components of them – If we review the documents, components of them arguably are, your Honor,

THE COURT: Okay. I'm sorry, anything else you wanted to tell me about my question with respect to whether the privilege has been waived or otherwise inapplicable because of disclosure?

MR. JOHNSON: No, I don't think it's been waived. When we talk about privileges, we need to go privilege by privilege, your Honor.

THE COURT: I don't want to spend a lot of time now, but if there's anything you want to -- I think it's been well covered in your memorandum, the specific privileges that you're claiming and the basis for them. I don't know at this point whether I want to take them privilege by privilege. Some of the privileges I'm very familiar with and some of them I'm not, but will become more familiar with them. But if there's anything that you want to particularly highlight for me with respect to those claims, I'd be happy to hear it.

MR. JOHNSON: No, your Honor. I think we fully briefed the privileges, your Honor, and outlined them.

* * *

[Tr. 125-26]

THE COURT: *** Mr. Farley, is it your claim that that's what was done in this case, that there was a determination by Judge Levin or some other Judge that there was a privilege, but he ordered -- notwithstanding the privilege, documents disclosed under seal to the other side?

MR. FARLEY: I don't know, your Honor, because I haven't traced that history.

All I'm saying is that those privileges have to be considered before any documents are released. You cannot ignore those privileges. They weigh into the balancing process if, indeed, the Court ever gets to that point. Obviously, our position is you shouldn't.

THE COURT: Right, I understand.

MR. FARLEY: But that's the point.

THE COURT: Okay.

APPENDIX J
Excerpts From Memorandum Of Law Filed By The Defendants Bishop Walter Curtis And Bridgeport Roman Catholic Diocesan Corporation In Support Of Their Motion For Protective Order Regarding The Use And Dissemination Of Discovery Information Obtained Through Depositions Of Bishop Curtis And Bishop Edward M. Egan (Sept. 14, 1994)

* * *

[P. 15-16]

1. The Right to the Free Exercise of Religion.

The plaintiffs' allegations against Bishop Curtis and the Diocese are largely based on claims concerning the Diocese's personnel practices and policies relating to priests serving on the staffs of local churches within the Diocese. Federal Constitutional rules relating to freedom of religion limit the permissible scope of this Court's inquiry into the Diocese's personnel decisions relating to its ordained clergy. Excessive judicial intervention into such priest personnel decisions could cause this Court to become excessively entangled in the internal affairs of the Roman Catholic Church. Such excessive entanglement is prohibited by the free exercise of religion clause of the First Amendment to the United States Constitution. See *Lemon* v. *Kurtzman*, 403 U.S. 602, 614-15, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971); *Dausch* v. *Ryske*, No. 92 C3029 slip op. at 5 (N.D. Ill. Feb. 10, 1993) 1993 WL 94873 (Copy attached); *Schmidt* v. *Bishop*, 779 F.Supp. 321, 327-28 (S.D.N.Y. 1992); *McDonnell* v. *Episcopal*

Diocese of Georgia, 191 Ga. App. 174, 175-77, 381 S.E.2d 126, cert. denied, 493 U.S. 935, 110 S.Ct. 328, 107 L.Ed.2d 318 (1989); *McElroy* v. *Guilfoyle*, 247 N.J. Super. 582, 586-87, 589 A.2d 1082 (1990). Thus, much priest personnel information obtained through these requested depositions may not be admissible into evidence during the trial of this lawsuit. Any such potentially inadmissible information should certainly not be disseminated to non-parties.

* * *

APPENDIX K
Excerpts From Memorandum Of Law Filed By The Defendants Bishop Walter Curtis And Bridgeport Roman Catholic Diocesan Corporation In Support Of Their Motion For Protective Order Barring Forced Disclosure Of Confidential Documents Or Information Whose Confidentiality Is Recognized By The Law Or Which Are Not Relevant To The Issues, Through The Depositions Of Bishop Curtis And Of Bishop Edward M. Egan
(Sept. 14, 1994)

* * *

[P. 13-15]

E. BECAUSE THE DIOCESE'S FEDERAL CONSTITUTIONAL FIRST AMENDMENT RIGHT TO FUNCTION AS A RELIGIOUS INSTITUTION COULD BE JEOPARDIZED BY FORCED DISCLOSURE OF INFORMATION RELATING TO OTHER PRIESTS, THAT FIRST AMENDMENT RIGHT CALLS FOR A HEIGHTENED STANDARD OF JUDICIAL SCRUTINY TO VERIFY SOME COMPELLING INTEREST BEFORE ANY CIVIL COURT ORDERS THE DIOCESE TO MAKE ANY DISCLOSURE.

The First Amendment of the Federal Constitution accords to the Diocese of Bridgeport the right to function as a religious institution without undue intrusion or entanglement from any branch of government including our court system. See, e.g., *Lemon* v. *Kurtzman*, 403 U.S. 602, 614-15, 91 S.Ct.

2105, 29 L.Ed.2d 745 (1971); *Dausch* v. *Ryske*, No. 92 C 3029, slip op. at 5 (N.D. Ill. Feb. 10, 1993) 1993 WL 34873 (copy attached) *Schmidt* v. *Bishop*, 779 F. Supp. 321, 327-28 (S.D.N.Y. 1991); *McDonnell* v. *Episcopal Diocese of Georgia*, 191 Ga. App. 174, 175-77, 381 S.Ed.2d 126, cert. denied, 493 U.S. 935, 110 S.Ct. 328, 107 L.Ed.2d 318 (1989); *McElroy* v. *Giulfoyle*, N.J. Super 582, 586-87, 589 A.2d 1082 (1990). That First Amendment right, which Bishop Curtis and the Diocese have invoked in one of their special defenses in this case, calls for this Court to avoid excessive intrusion in the affairs of the Diocese as a religious institution and to avoid any discovery order which may be unduly burdensome to the Diocese's ability to function as a religious institution. See *Schmidt* v. *Diocese*, 779 F. Supp at 327-28; *McDonnell* v. *Episcopal Diocese of Georgia*, 191 Ga. App. at 175-77. That First Amendment right of the Diocese and the Diocese's kindred right conferred by Article First, Section 3 of the Connecticut State Constitution obviously would be jeopardized were this Court, without compelling reason, to rule that the requested documentation and information about other priests were to have to be disclosed in this instance, thereby causing any Diocese-affiliated priests to be disabled from performing their priestly ministry. (Bronkiewicz Aff. Paras. 15 and 16) Thus, that potential negative impact on that First Amendment Constitutional right of the Diocese calls for this Court to exercise a heightened standard of judicial scrutiny to verify some compelling interest before ordering that type of potentially harmful disclosure. See *Elrod* v. *Burns*, 427 U.S. 347, 362-63, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976); *Uryevick* v. *Rozzi*, 751 F. Supp. 1064, 1068 (E.D.N.Y. 1990). There is clearly no such compelling interest in this

case for ordering the disclosure of the irrelevant requested information and documents about misconduct complaints or incidents relating to other priests.

In addition, the laws of the Roman Catholic Church, as codified in the Code of Canon Law, Canon 1717 required the Diocese to investigate of any claim of sexual misconduct by any priest. Code of Canon Law, Canons 220 and 1719, required that any such investigation be kept strictly confidential. Thus, any order of this Court compelling the production by the Diocese of any such confidential information would constitute State action intruding on the Diocese's ability to function as a religious institution, and thereby violating its First Amendment Federal Constitutional right and its similar right under the Connecticut Constitution Article First, Section 3. There is simply no compelling interest which might justify ordering any disclosure of the not genuinely relevant information and documents requested in this case.

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APPENDIX L
OFFICIAL 2009 CONNECTICUT PRACTICE BOOK, Procedure in Civil Matters. Section 11-20A: "Sealing Files or Limiting Disclosure of Documents." (January 1 2005)

* * *

[P. 181]

Sec. 11-20A. Sealing Files or Limiting Disclosure of Documents in Civil Cases

(a) Except as otherwise provided by law, there shall be a presumption that documents filed with the court shall be available to the public.

* * *

[P. 182]

COMMENTARY—2003: The public and press enjoy a right of access to attend trials in civil as well as criminal cases. See *Nixon* v. *Warner Communications, Inc.*, 435 U.S. 589, 597–608, 98 S. Ct. 1306, 55 L. Ed. 2d 570 (1978). The guarantee of open public proceedings in civil trials applies as well to the sealing of court documents. See *Publicker Industries, Inc.* v. *Cohen*, 733 F.2d 1059, 1070–71 (3d Cir. 1984).

See also the Commentary to Section 42-49A.

APPENDIX M

OFFICIAL 2009 CONNECTICUT PRACTICE BOOK, Procedure in Criminal Matters. Section 42-49A: "Sealing or Limiting Disclosure of Documents in Criminal Cases." (January 1 2005)

* * *

[P. 366]

COMMENTARY—2003: The public and press enjoy a right of access to attend trials in criminal cases and to access documents filed in connection with such cases. *Press-Enterprise Co.* v. *Superior Court*, 478 U.S. 1, 10, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) (*Press-Enterprise II*); *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 606, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982); *Associated Press* v. *United States District Court*, 705 F.2d 1143, 1145 (9th Cir. 1983); *United States* v. *Gerena*, 703 F. Sup. 211, 213 (D. Conn. 1988), citing *In re Matter of the New York Times Co.*, 828 F.2d 110, 114 (2d Cir. 1987). This right is well settled in the common law and has been held to be implicit in the first amendment rights protecting the freedom of speech, of the press, of peaceable assembly and to petition the government for a redress of grievances. *Globe Newspaper Co.* v. *Superior Court*, supra, 604–605; *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 575, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980); see generally *Press-Enterprise II*, supra, 6–13; see also *In re Matter of the New York Times Co.*, supra, 113; *United States* v. *Gerena*, supra, 213.

The right of access to documents is not absolute. *United States* v. *Gerena*, supra, 703 F. Sup. 213. The presumption of openness may be overcome only by

an overriding interest based on findings that denying access is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was entered properly. *Id.*, citing *Press-Enterprise II*, supra, 478 U.S. 9–10; see also *United States* v. *Haller*, 837 F.2d 84, 87 (2d Cir. 1988); *Doe* v. *Meachum*, 126 F.R.D. 452, 455 (D. Conn. 1989); *State* v. *Kelly*, 208 Conn. 365, 372, 545 A.2d 1048 (1988). Such findings may be made under seal when necessary. *United States* v. *Haller*, supra, 87.

Since the circumstances of a particular case may affect the significance of the interest sought to be protected, the requirement that specific findings justifying closure or sealing be articulated mandates a case-by-case analysis of the interest involved. *Globe Newspaper Co.* v. *Superior Court*, supra, 457 U.S. 607–608; *In re Knight Publishing Co.*, 743 F.2d 231, 235 (4th Cir. 1984); see *Publicker Industries, Inc.* v. *Cohen*, 733 F.2d 1059, 1070–71 (3d Cir. 1984). "For a case-by-case approach to be meaningful, representatives of the press and general public 'must be given an opportunity to be heard on the question of their exclusion.'" *Globe Newspaper Co.* v. *Superior Court*, supra, 609 n.25, quoting *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 401, 99 S. Ct. 2898, 61 L. Ed. 2d 608 (1979) (Powell, J., concurring). Except in extraordinary circumstances, the press and public must have a means of learning of the closure or sealing order. See *United States* v. *Haller*, supra, 837 F.2d 87; *In re Knight Publishing Co.*, supra, 235. In *In re the Application of the Herald Co.*, 734 F.2d 93, 102 (2d Cir. 1984), the court stated that "a motion for courtroom closure should be docketed in the public

docket files maintained in the court clerk's office. . . . The motion itself may be filed under seal, when appropriate, by leave of the court . . . ." (Citation omitted.) See also *In re Knight Publishing Co.*, supra, 235; *In re Knoxville News-Sentinel Co.*, 723 F.2d 470, 474–76 (6th Cir. 1983).

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(2)

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No. 09-246

In the Supreme Court of the United States

BRIDGEPORT ROMAN CATHOLIC DIOCESAN CORPORATION, CARDINAL EDWARD M. EGAN, REVEREND MONSIGNOR THOMAS DRISCOLL AS EXECUTOR OF THE ESTATE OF BISHOP WALTER CURTIS, REVEREND MONSIGNOR ANDREW T. CUSACK, AND REVEREND MONSIGNOR LAURENCE BRONKIEWICZ,

Petitioners,

v.

THE NEW YORK TIMES COMPANY, THE HARTFORD COURANT COMPANY, GLOBE NEWSPAPER COMPANY, INC., THE WASHINGTON POST COMPANY, AND GEORGE L. ROSADO,

Respondents.

On Petition for a Writ of Certiorari to The Supreme Court of Connecticut

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS*

The Becket Fund for Religious Liberty is a nonprofit, nonpartisan law firm dedicated to protecting the free expression of all religious traditions.[1] The Becket Fund has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world. The Becket Fund has also represented virtually every kind of religious polity, including congregational, hierarchical, and trustee-led churches.[2]

The Becket Fund has an interest in this case because it regularly represents organizations asserting a constitutional right of church autonomy. See, *e.g.*, *Curay-Cramer* v. *Ursuline Acad. of Wilmington, Delaware, Inc.*, 450 F.3d 130, 141 (3d Cir. 2006); *Hindu Temple Soc'y of N. Am.* v. *Supreme Court of New York*, 335 F. Supp. 2d 369, 374 (E.D.N.Y. 2004). Such organizations frequently face claims that they have somehow waived their church autonomy rights. The Becket Fund is therefore concerned that the Connecticut Supreme Court's "inadvertent waiver" standard, if adopted elsewhere, will weaken church autonomy and undermine religious liberty nationwide.

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[1] Pursuant to Rule 37.2, counsels of record for the parties received timely notice of the intent to file this brief and have consented to its filing. As required by Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than the *amicus*, its members, and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

[2] This brief uses the term "church" broadly to refer to religious organizations of all different faith traditions.

SUMMARY OF ARGUMENT

This brief makes two simple points: (I) The question of whether a church has waived its autonomy rights is recurring and difficult; and (II) The waiver question has serious practical consequences.

I. Far from being limited to the facts of this case, the waiver question arises in a wide variety of church autonomy cases and at many stages of litigation. Often litigants claim that a church has waived its autonomy defense by failing to raise it properly—much like the Connecticut Supreme Court concluded here. Part I.A., *infra*. In other cases, a claim of waiver is based on the notion that the church has bargained away its autonomy rights contractually, or has waived those rights by pledging to refrain from certain types of conduct. Part I.B., *infra*. Still other cases consider whether a church has waived its autonomy rights by receiving government funds. Part I.C., *infra*.

In all these cases, courts must confront the same question presented here: When does a church waive its autonomy rights? This is an important, recurring, and "open question." *Hollins* v. *Methodist Healthcare*, 474 F.3d 223, 227 (6th Cir. 2007) (McKeague, J., concurring). This Court should take the opportunity to clarify that the right of church autonomy, like other constitutional rights, can be waived only if the waiver is "voluntarily, intelligently, and knowingly" made. *Fuentes* v. *Shevin*, 407 U.S. 67, 94-95 (1972).

II. The waiver question is also noteworthy because of its sweeping practical consequences. *First*, the Connecticut Supreme Court's "inadvertent waiver" rule undermines religious liberty. If a church

accidentally waives its rights, the government can force the church to expose its most sensitive, internal deliberations to the public—without any balancing of the church's rights or the government's interests. Similarly, in the event of inadvertent waiver, secular courts can second-guess the most intimate decisions of religious bodies, such as who can be a minister or how a church should be structured. Such intrusion into a church's internal affairs seriously undermines religious liberty.

Second, Connecticut's inadvertent waiver rule threatens to entangle church and state. If, for example, a church inadvertently waives autonomy in an employment discrimination suit, courts will be obliged to decide whether the minister was fired over a genuine theological dispute, or whether the theological dispute was merely pretext for discrimination. Under an inadvertent waiver rule, there is virtually no limit to the religious questions courts can be compelled to resolve.

Third, the inadvertent waiver rule provokes needless church–state litigation. Here, by construing the Diocese's cooperation in the underlying lawsuit as a waiver, the Connecticut Supreme Court penalizes the church's attempt to settle. In other cases, claims that would plainly be barred by a church autonomy defense could succeed if the church inadvertently waives its rights. The inadvertent waiver rule thus gives life to otherwise meritless lawsuits.

ARGUMENT

I. The question of whether a church has waived its autonomy rights is recurring and difficult.

The first question presented—whether and how a church can waive its autonomy rights[3]—is a question of exceptional importance. The waiver question is not limited to the narrow facts of this case (namely, public access to church documents produced under seal). Rather, it arises in a wide variety of contexts and at many stages of litigation. The Court should grant certiorari to address this difficult, recurring issue.

A. One of the most common waiver arguments in church autonomy cases is that a church has waived its autonomy defense by failing to raise it at the proper time or in the proper manner. Here, for example, the Connecticut Supreme Court concluded that the Diocese should have raised church autonomy earlier and more clearly—*e.g.*, by refusing to produce documents and risking contempt, by asserting church autonomy objections when each document was produced, or by moving to clarify the basis of the trial court's protective orders. Pet.66a-67a.

Other cases frequently involve the same argument. In *Petruska* v. *Gannon University*, for example,

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[3] This brief uses "church autonomy rights" broadly to refer to freedom from state interference in a church's internal affairs, including church structure and governance, *Kedroff* v. *St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94 (1952), selection of ministers (the "ministerial exception"), *Petruska* v. *Gannon University*, 462 F.3d 294 (3d Cir. 2006), and resolution of intrachurch disputes (the "neutral principles" approach), *Jones* v. *Wolf*, 443 U.S. 595 (1979).

an ex-chaplain sued a Catholic university for gender discrimination. 462 F.3d 294, 308 (3d Cir. 2006). According to the plaintiff, the university waived its church autonomy defense by failing to raise it in an administrative proceeding before the Equal Employment Opportunity Commission. *Ibid.* The Third Circuit rejected the waiver argument, however, concluding that the university had no obligation to raise church autonomy in an administrative proceeding because administrative agencies generally are not competent to resolve constitutional issues. *Id.* at 308-09.

By contrast, in *Hutchinson* v. *Luddy*, 763 A.2d 826 (Pa. Super. 2000), which involved a claim of negligent supervision against a diocese, the state appellate court held that the diocese waived its church autonomy defense by failing to raise it adequately in the trial court. According to the court, raising church autonomy in a footnote in the trial court and asserting it "in the context of discovery of archived documents" was insufficient to preserve the argument as a defense on appeal. *Id.* at 833-34.

Other courts, however, have held that church autonomy is a jurisdictional issue that can never be waived, even if a church fails to raise it altogether. See, *e.g.*, *EEOC* v. *Catholic Univ. of Am.*, 856 F. Supp. 1 (D.D.C. 1994), aff'd 83 F.3d 445 (D.C. Cir. 1996) (raising church autonomy *sua sponte* after trial and dismissing gender discrimination claims by professor of canon law against a Catholic university). As the Seventh Circuit concluded, "[T]he ministerial exception, like the rest of the internal-affairs doctrine, is not subject to waiver or estoppel." *Tomic* v. *Catho-*

lic Diocese of Peoria, 442 F.3d 1036, 1042 (7th Cir. 2006) (Posner, J.).

B. The question of waiver also frequently arises in employment disputes, where litigants argue that a church has waived its autonomy rights either by bargaining those rights away contractually, or by pledging to refrain from unlawful employment discrimination. In *Minker* v. *Baltimore Annual Conference of United Methodist Church*, for example, the D.C. Circuit noted that "[a] church is always free to burden its activities voluntarily through contracts, and such contracts are fully enforceable in civil court." 894 F.2d 1354, 1359 (D.C. Cir. 1990). But when resolving an employment dispute between a minister and church, it can be difficult to determine whether a church has, in fact, bargained away its autonomy rights in a purely secular contract.

Minker involved two contract claims. One claim was based on the church's "Book of Discipline," which promised that clergy appointments would be made "without regard to race, ethnic origin, sex, color, or age." *Id.* at 1358. According to the plaintiff, because the church contractually disavowed any right to practice age discrimination, it could not assert a church autonomy defense against a claim of age discrimination. The court, however, rejected this argument, concluding that it would require the court "to consider the religious purpose of the antidiscrimination provision [in the Book of Discipline] and to define its limits for the church." *Id.* at 1359.

By contrast, the court allowed the minister's oral contract claim to go forward, concluding that a church autonomy defense was unavailable if the

church had breached a purely secular promise to assign the minister to a more suitable congregation. *Id.* at 1360-61. See also *Welter* v. *Seton Hall Univ.*, 128 N.J. 279, 297-300 (1992) (rejecting church autonomy defense to breach of contract claim because the Catholic university had entered a secular employment contract that "did not incorporate an implied covenant to abide by Roman Catholic Canon Law").

Plaintiffs also routinely claim that a church has waived its autonomy defense by holding itself out as an "equal opportunity employer." According to these plaintiffs, by promising to abide by federal employment discrimination laws, a church waives its right to invoke the church autonomy defense in employment discrimination cases. See *Petruska*, 462 F.3d at 308; *Minker*, 894 F.2d at 1357; *Tomic*, 442 F.3d at 1041-42. Other plaintiffs have argued that, by seeking accreditation from an organization that forbids employment discrimination, church-affiliated organizations waive their right to invoke the ministerial exception. *Hollins* v. *Methodist Healthcare, Inc.*, 474 F.3d 223, 226 (6th Cir. 2007).

Although most courts have rejected these arguments, they have done so on the ground that a waiver of church autonomy rights must be established by "clear and compelling" evidence and must be "knowingly" and "voluntarily" made—a standard at odds with the inadvertent waiver rule adopted by the Connecticut Supreme Court. *Ibid.*; *Petruska*, 462 F.3d at 309.

C. Finally, some plaintiffs have asserted that a church waives its autonomy rights by accepting state or federal funds. The Third Circuit rejected this ar-

gument in *Petruska*, concluding that accepting government funds did not constitute "an intentional relinquishment or abandonment" of the ministerial exception. 462 F.3d at 308-09.

In *Dodge* v. *Salvation Army*, however, the court found the receipt of federal funds problematic. There, a former employee sued the Salvation Army for religious discrimination under Title VII; the Salvation Army argued that the firing was protected under Title VII's "religious exemption," which (much like the ministerial exception) protects the right of religious organizations to hire and fire on the basis of religion. 1989 WL 53857 at *2 (S.D. Miss. 1989); 42 U.S.C. § 2000e-1. The district court, however, rejected the Salvation Army's argument, concluding that applying the religious exemption would unconstitutionally advance religion because "the plaintiff's position * * * was funded substantially, if not entirely, by federal, state and local government [funds]." *Id.* at *4.

Under the same reasoning, applying the church autonomy doctrine to a religious organization that receives government funds would also unconstitutionally advance religion. A religious organization would thus waive its church autonomy rights by receiving government funds.

* * * * *

Although this case comes to the Court in a specific factual context—including tragic allegations of clergy sexual abuse, protective orders sealing internal church documents, and third-party attempts to access those documents—it presents a question that routinely plagues church autonomy cases. That question can arise any time church autonomy is at issue;

the cases cited above are merely a representative sample. Most discovery disputes over the confidentiality of church documents never make their way into a reported case. Based on considerations of frequency alone, then, this case presents a question of exceptional importance.

II. The Connecticut Supreme Court's inadvertent waiver rule has sweeping, detrimental consequences.

The question of waiver is significant not only for its frequency, but also for its serious practical consequences. Connecticut's resolution of the waiver issue—allowing churches to waive their constitutional rights *inadvertently*—undermines religious liberty, threatens to entangle church and state, and provokes needless church–state litigation.

A. The inadvertent waiver rule undermines religious liberty.

First and foremost, the right of church autonomy promotes religious liberty by protecting churches from state interference with their internal affairs. Churches have the right "to decide for themselves, free from state interference," a wide variety of internal matters. *Kedroff*, 344 U.S. at 116. These matters include, among other things, (1) church government, structure, and discipline, (2) selection of church leaders, and (3) development of church doctrine. *Ibid.*; *Watson* v. *Jones*, 80 U.S. 679, 727 (1871). Churches also have the right to *deliberate* about these matters without state interference. *Ibid.*

An inadvertent waiver rule poses several threats to church control over internal affairs—not only in

this case, but in church autonomy cases more generally.

1. In this case, the *New York Times* is attempting to use state power to pry confidential internal documents away from the Diocese of Bridgeport. At stake is the church's right to shield its internal deliberations from public view. According to the Connecticut Supreme Court, the church forfeited this right—not because the public interest in judicial documents outweighs that right, but simply because the church inadvertently waived it. App.66a-69a. The inadvertent waiver rule thus greatly increases the risk that the church's internal deliberations will be made public.

Public exposure of internal deliberations causes two harms. The first is an immediate invasion of privacy: By court order, the church is forced to turn over physical and mental health evaluations of priests and reveal its internal evaluations of fitness for ministry. The state could never force churches to reveal this information to the general public, say, as a condition of receiving tax-exempt status; in many circumstances, the state cannot even force churches to reveal information *to their own members*. See, *e.g.*, *Gipson* v. *Brown*, 295 Ark. 371, 377 (1988) (forcing church to disclose financial information to its members under the state nonprofit corporation law would violate church autonomy). But by invoking a rule of involuntary waiver, Connecticut achieves an otherwise unconstitutional result.[4]

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[4] Respondents may argue that the state should be allowed to force churches to reveal their internal church deliberations whenever it has a compelling interest in doing so—such as

Second, an increased risk of public exposure changes how churches deliberate (and thus what decisions churches ultimately reach). As this Court observed in the context of Executive branch deliberations, the threat of public exposure inevitably alters the deliberative process:

> Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests *to the detriment of the decisionmaking process*.

United States v. *Nixon*, 418 U.S. 683, 705 (1974) (emphasis added).

This axiom proves true in a variety of contexts. For example, a vast body of secondary literature has shown that "open-meeting laws"—which expose legislative or agency deliberations to the public—can have a significant adverse effect on the quality of deliberations and decisions.[5] For the same reason, this Court

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when investigating and punishing the sexual abuse of minors. But the Connecticut Supreme Court relied on no such balancing of interests. App.66a-69a. Rather, under an inadvertent waiver rule, it makes no difference whether the underlying lawsuit involves sexual abuse of minors or a slip-and-fall on the church steps—once the church begins producing internal documents (even if it does so under seal), it loses any right to keep its internal deliberations private. Rejecting an inadvertent waiver rule, by contrast, would not immunize churches from criminal and civil liability; it would simply ensure that the church's interests are considered in the balance with the state's.

[5] See, *e.g.*, John F. O'Connor & Michael J. Baratz, *Some Assembly Required: The Application of State Open Meeting Laws to Email Correspondence*, 12 Geo. Mason L. Rev. 719, 766 (2004) (collecting sources); Ellen E. Meade & David Stasavage, *Publicity of Debate and the Incentive to Dissent: Evidence from the US*

has recognized a "deliberative process privilege"—which protects internal government deliberations from discovery—for "the obvious [reason] that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news." *Dept. of Interior* v. *Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8-9 (2001).

Moreover, many of the Framers believed that, without the secrecy of the 1787 Constitutional Convention, "no constitution of the kind that was developed could have been written." *Nixon*, 418 U.S. at 705 n.15 (citing C. Warren, *The Making of the Constitution* 134-39 (1937)). And, in debates over whether this Court's oral arguments should be videotaped, prominent opponents of videotaping have argued that videotaping would adversely affect the deliberative process. See *Judicial Security and Independence: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 73-80 (2007) (statement of Justice Kennedy to Senator Spector) ("A majority of my court feels very strongly * * * that televising our proceedings would change our collegial dynamic.").

The threat of inadvertent public exposure affects the deliberations of churches no less. Consider just one of many important decisions: the selection and

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Federal Reserve, 118 Econ. J. 695 (2008) (finding that the Federal Reserve's decision to publish transcripts of its meetings resulted in a statistically significant reduction in dissent and debate); Thomas H. Tucker, *"Sunshine"—The Dubious New God*, 32 Admin. L. Rev. 537, 546 (1980) ("[There is] unanimous agreement among all branches of the federal government that publicity inhibits candor and the free exchange of ideas and that these qualities are important to the effective functioning of the government.").

evaluation of ministers. If sensitive, internal church deliberations can be made public without a knowing and voluntary waiver of rights, churches will have every incentive to conduct sensitive deliberations in oral rather than written form. The threat of exposure can even create a *disincentive* to uncovering and discussing problematic issues, at least where those issues are not immediately relevant to the decision at hand. An inadvertent waiver rule thus undermines the church's search for truth.

The threat of exposure can also change the decisions a church ultimately reaches. As the Diocese has pointed out, the "tri-fold belief in remorse, redemption, and rehabilitation"—the belief that people can change—plays a key role in "whether to restore someone to ministry who has been accused of improper conduct." Pet.11. The threat that the church's deliberations will be publicly exposed and second-guessed exerts a not-so-subtle pressure on the church to give less weight to this belief.

Finally, the threat of exposure alters the incentives of prospective ministers. Some perfectly fit candidates may avoid a process that threatens to air their private physical and mental health records to the public (thus reducing the supply of willing ministers). Other candidates may hide their past problems from the church—either fearing that the church will reject them because it can no longer give full weight to "remorse, redemption, and rehabilitation," or fearing that their personal history will land in the *New York Times*. Such incentives actually *impede* churches' efforts to protect the children in their care, making it significantly more difficult to identify potentially problematic ministers.

In short, when churches control the privacy of their internal deliberations, they are free to engage in a robust, uninhibited search for truth. But by robbing churches of control over their privacy, an inadvertent waiver rule significantly—and unconstitutionally—alters churches' decisions.[6]

2. Nor are the problems of an inadvertent waiver standard limited to the facts of this case. As explained in Part I above, questions of waiver arise in numerous contexts. Litigants confronted with a church autonomy defense routinely argue that a church has inadvertently waived that defense—whether by failing to raise it properly, *Hutchinson*, 763 A.2d at 833-34, abandoning it contractually,

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[6] Some may argue that, in light of past abuses, governments have a compelling interest in regulating the way churches deliberate. But while governments certainly have a compelling interest in preventing and punishing crimes such as sexual abuse, the First Amendment restricts the *means* by which governments can pursue that interest. See *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 546-47 (1993) (applying least restrictive means test). For example, although the state can punish ministers who engage in sexual abuse (or churches that facilitate it), the state can't dictate how churches choose their ministers. Forcing churches to make their internal deliberations public has the same effect: it changes the way churches deliberate, and it changes the decisions they reach.

Thus, even assuming churches want to change the way they deliberate—and many do—the government lacks constitutional authority to impose such a change. As a prominent commentator has observed, "Even if government policy and church doctrine endorse the same broad goal, the church has a legitimate claim to autonomy in the elaboration and pursuit of that goal." Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373, 1399 (1981).

Minker, 894 F.2d at 1358-59, claiming to be an equal opportunity employer, *Tomic*, 442 F.3d at 1041-42, or receiving government funds, *Petruska*, 462 F.3d at 308. In any of these contexts, an inadvertent waiver rule can seriously undermine religious liberty.

To take just one example, if the Third Circuit had accepted the plaintiff's inadvertent waiver argument in *Petruska*, the court would have been forced to decide whether a Catholic university's decision to restructure was a genuine religious decision "about who would perform spiritual functions and about how those functions would be divided," or was merely a "pretext for gender discrimination." 462 F.3d at 307. The harm to religious liberty of an erroneous decision is enormous: punishing a Catholic university for its religion-based choice of chaplain. The same could be said in any number of inadvertent waiver scenarios.[7]

B. The inadvertent waiver rule threatens to entangle church and state.

For similar reasons, Connecticut's inadvertent waiver rule also threatens to entangle the state in answering religious questions. Such entanglement is problematic both because secular courts lack competence to resolve religious questions, *Minker*, 894 F.2d

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[7] See, *e.g.*, *Hutchinson*, 763 A.2d at 833-34 (inadvertent waiver authorized court to punish Catholic diocese for retaining a priest); *Tomic*, 442 F.3d at 1041-42 (inadvertent waiver argument would authorize court to punish Catholic diocese for choice of music director and organist); *Minker*, 894 F.2d at 1356 (inadvertent waiver argument would authorize court to punish the United Methodist Church for failing to assign pastor to a congregation more suited to his training and skills).

at 1356-57, and because resolving such questions may violate the Establishment Clause, *Bryce* v. *Episcopal Church in the Diocese of Colorado*, 289 F.3d 648, 655 (10th Cir. 2002).

In this case, the underlying lawsuits against the Diocese raised serious issues of entanglement. Those lawsuits sought to hold the Diocese liable in tort for its choice of ministers, forcing the court to determine whether the church's weighing of purely religious factors constituted negligence. The court could not resolve that issue without delving into religious questions.

Moreover, even assuming a court can now force the Diocese to make its internal documents public without resolving a religious question, applying the inadvertent waiver rule in other cases will undoubtedly create serious entanglement issues.

In employment cases like *Petruska*, for example, an inadvertent waiver rule would force courts to probe the internal motives of religious organizations, deciding whether employment decisions were motivated by doctrinal concerns or discriminatory animus. 462 F.3d at 307. In labor-relations disputes—such as whether a religious school is subject to collective bargaining obligations under the National Labor Relations Act—an inadvertent waiver rule would subject religious schools to "intrusive inquiries into [their] religious beliefs," and state interference with their employment practices. *Univ. of Great Falls* v. *NLRB*, 278 F.3d 1335, 1341-42 (D.C. Cir. 2002). And in tort suits—such as breach of fiduciary duty claims based on misuse of church funds—an inadvertent waiver rule could plunge courts into doctrinal dis-

putes over "the proper role of * * * church officials" and whether certain expenditures were "proper in light of [the church's] religious doctrine and practice." *Harris* v. *Matthews*, 361 N.C. 265, 273 (2007).

It is therefore no surprise that, citing entanglement concerns, some courts have held that church autonomy rights can *never* be waived—let alone waived inadvertently. *Tomic*, 442 F.3d at 1042; *Hollins*, 474 F.3d at 227 (McKeague, J., concurring). Such rulings caution against an approach that, like Connecticut's rule here, would drag the state into religious disputes merely because a church inadvertently waived its constitutional rights.

C. The inadvertent waiver rule provokes needless church–state litigation.

Finally, an inadvertent waiver rule discourages settlement and provokes needless church–state litigation.

In this case, the Diocese produced sensitive documents and settled the underlying lawsuit based in part on assurances that those documents would be kept confidential. The inadvertent waiver rule, however, punishes this attempt to comply with discovery requests and settle out of court. As respondents argue, if the Diocese wanted to preserve its autonomy rights, it had to "violate the [lower court's discovery] order and risk the pain of contempt in order to obtain a right to appeal." Respondent's Opp. to App. to Extend Stay at 15. That, of course, is a Hobson's choice: the church can produce documents and settle, but only at the expense of its constitutional rights.

The inadvertent waiver rule not only discourages settlement but also encourages new litigation. Under

a "knowing and voluntary" waiver standard, it is clear that many lawsuits against churches will not succeed—*e.g.*, an ex-minister's Title VII suit will almost always be barred by the ministerial exception. But if a church can inadvertently waive its autonomy rights, otherwise meritless suits receive new life. Maybe the church has waived its rights by holding itself out as an equal opportunity employer; maybe the church will waive its rights by failing to raise them properly; maybe the church has received too much government funding. Plaintiffs will never know unless they file suit; the inadvertent waiver standard thus encourages unnecessary litigation over sensitive church-state issues.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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